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Nos. 6994 and 6995

United States
Circuit Court of Appeals
For the Ninth Circuit

MARIAN B. PRINGLE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

and

PHYLLIS B. BRUNSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Upon Petitions to Review an Order of the United States Board of Tax Appeals.

PERNAU-WALSH PRINTING CO., 755 MARKET ST., SAN FRANCISCO

No. 6994

TRANSCRIPT OF RECORD.

United States

Circuit Court of Appeals

For the Ninth Circuit

MARIAN B. PRINGLE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Upon Petition to Review the Decision of the United States Board of Tax Appeals.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES.

JOHN B. MILLIKEN, Esq.,
RAYMOND W. STEPHENS, Esq.,
R. W. SMITH, Esq. (withdrawn),
For Petitioner.

C. H. CURL, Esq.,
For Respondent.

DOCKET ENTRIES.

1928

Feb. 11—Petition received and filed. Taxpayer notified. (Fee paid.)

Feb. 13—Copy of petition served on General Counsel.

Apr. 13—Answer filed by General Counsel.

Apr. 16—Copy of answer served on taxpayer—Circuit Calendar.

1930

Jan. 16—Notice of appearance of John B. Milliken as counsel for taxpayer filed.

Mar. 19—Hearing set May 23, 1930—Los Angeles, California.

May 23—Hearing held before S. J. McMahon, Division 16, on merits. Consolidated for hearing with 34944. Stipulation of facts filed. Briefs due 60 days from date.

July 21—Motion for extension to 9/1/30 to file brief filed by taxpayer. 7/23/30 granted.

July 22—Brief filed by General Counsel.

Aug. 20—Brief filed by taxpayer.

1932

Apr. 29—Transcript of hearing of May 23, 1930 filed.

June 9—Findings of fact and opinion rendered—S. J. McMahon, Division 16. Judgment will be entered for respondent.

June 10—Decision entered, Division 16.

Sept. 7—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

Sept. 7—Proof of service filed.

Sept. 7—Notice of the withdrawal of Claude I. Parker and Ralph W. Smith as counsel filed.

Sept. 7—Notice of the appearance of Raymond W. Stephens as counsel filed.

Sept. 19—Praecipe filed.

Sept. 19—Proof of service filed. [1]*

Filed Feb. 11, 1928.

*Page numbering appearing at the foot of page of original certified Transcript of Record.

United States Board of Tax Appeals.

Docket No. 34,943

MARIAN B. PRINGLE,
6461 Sunset Boulevard,
Hollywood, California,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION.

The above named petitioner hereby petitions for a redetermination of a deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:FAR:B-5—MMB-60D, dated December 15, 1927 and as a basis for her proceeding alleges as follows:

1. The petitioner is an individual with principal office at 6461 Sunset Boulevard, Hollywood, California.

2. The notice of deficiency, a copy of which is attached hereto and marked "Exhibit A" was mailed to the petitioner on December 15, 1927.

3. The taxes in controversy are income taxes for the calendar year 1923 and for $3,243.85.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

a. The Commissioner erred in computing the profit on the sale of certain real estate acquired and sold during the year 1923.

b. The Commissioner erred in using an erroneous basis for computing gain or loss on the real estate sold during the [2] year 1923 in that the value at the date of death of testator was used instead of the value as at the date of distribution and acquisition by petitioner as a beneficiary under a trust created by the will of said testator.

5. The facts upon which the petitioner relies as a basis for this proceeding are as follows:

(a) Petitioner received certain real estate situated in the City of Hollywood, California, from a trust created by the will of Ida Wilcox Beveridge, mother of petitioner, the original owner of the property, who died August 7, 1914. This will, which was duly admitted to probate in the Superior Court of the State of California in and for the County of Los Angeles, contained the following conditions:

All of the estate of the deceased was devised and bequeathed to Philo J. Beveridge, surviving husband and Madge H. Connell surviving sister of the deceased to be held in trust with power to sell the properties or any part thereof and receive the rents, issues and profits therefrom. The trustees were also directed to set aside a part of the property not to exceed one acre as a homestead, and erect thereon and furnish a residence to be used by said Philo J. Beveridge or Madge H. Connell and the children

of the deceased and also the deceased's mother. Income at the rate of $200.00 per month was set aside for the support and maintenance of those persons who might reside in the homestead. The homestead was to terminate upon the death of the survivors—Madge H. Connell and Philo J. Beveridge.

The balance of the income was made payable to the children of the deceased, who at her death were Marian Beveridge (now Marian [3] Pringle, Petitioner), and Phyllis Beveridge (now Phyllis Brunson), these parties to receive a reasonable amount for their maintenance until they reached maturity, the accumulated and undistributed balance at their maturity was to be distributed equally to them.

(b) The trust was to terminate when the youngest daughter became twenty five years of age, or was to terminate upon the death of both of said daughters, if they should die without issue before reaching the age of twenty five.

(c) With respect to the vesting of title in the beneficiaries, it is provided that:

1. If the two daughters be living at the termination, the property (except the homestead) "shall descend to and be distributed among such" daughters.

2. If, however, the daughters or either of them shall be then not living, but shall have left issue, the issue shall take the share of the deceased daughter.

3. If the daughters should die without issue surviving, then the whole of the property shall pass to Madge H. Connell and Philo J. Beveridge, share and share alike with certain conditional provisions with relation to vesting in case either of them be dead, which provisions are not material here.

(d) Phyllis Beveridge, the younger daughter, reached the age of twenty five years on the 25th day of July, 1923, and by virtue of the terms of the will, the trust terminated upon that date and the trust property vested in Phyllis Brunson and Marian Pringle, except as to the homestead rights, and as to the $200.00 per month income provided for those in the homestead. The home- [4] stead rights and the income rights of Philo J. Beveridge terminated upon his death in the year 1921 and as of the date of June 30, 1923, shortly before the trust terminated, Madge H. Connell, the sister of Ida W. Beveridge, and Amelia Hartell, the mother of Ida W. Beveridge, transferred and surrendered to Phyllis Brunson and Marian Pringle their homestead and income rights so that upon the termination of the trust, the full title without any incumbrances vested in Marian Pringle and Phyllis Brunson.

Under the will, no legal title to the contingent trust estate could vest in the beneficiaries until it was determined when the younger daughter reached the age of twenty five years, who was in being to take the corpus as provided in Clause Four of the

will, to wit: "shall descend to and be distributed among such of my children as shall be living at the expiration of the trust."

Petitioner could not and did not take title to the property under the provisions of the will until the conditions precedent to its acquirement as set out under the will were fully complied with and her taking title was deferred until these provisions were fully met.

Petitioner acquired on July 25, 1923, under the provisions of the above named will, together with certain other property, lots 1 to 9 and 11 to 18, inclusive, in Tract 6562, Hollywood, California, and lots 7, 8 and 9, Block 3, Hollywood, California, which described property was sold during the year 1923 for $288,906.00. This property had a fair market value [5] as of July 25, 1923, based on actual sales of $271,596.72. The subsequent improvements on the said property were $17,559.28 and the total selling costs amounted to $12,683.24, which resulted in a net loss from the sale of said property of $12,933.24.

6. The petitioner prays for relief from the deficiency asserted by the respondent on the following and each of the following particulars:

a. That she be allowed to compute the profit or loss on the sale of property received and sold during the year 1923 on the basis of calculation at the date acquired—July 25, 1923, which fair market

value as fully substantiated by actual sales was $271,596.72.

WHEREFORE petitioner prays that this Board may hear and redetermine the deficiency herein alleged.

MARIAN B. PRINGLE,
Petitioner.

State of California,
County of Los Angeles.—ss.

Marian B. Pringle, being duly sworn, says that she is the petitioner above named; that she has read the foregoing petition, or had the same read to her, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts she believes to be true.

MARIAN B. PRINGLE.

Subscribed and sworn to before me this 6th day of February, 1928.

[Seal] MARGUERITE LE SAGE,
Notary Public in and for the County of Los Angeles, State of California. [6]

Treasury Department.
Washington.

IT:FAR:B-5
MMB-60D

December 15, 1927.

Mrs. Marion B. Pringle,
6380 Hollywood Boulevard,
Los Angeles, California.
Madam:

The determination of your tax liability for the year 1923 discloses a deficiency of $3,243.85, as shown by the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:FAR:B-5-MMB-60D. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,
Commissioner,
By C. B. ALLEN,
Deputy Commissioner.

Inclosures:
Statement
Form A
Form 882 [7]

Statement.

December 15, 1927.

IT:FAR:B-5
MMB-60D

In re: Mrs. Marion B. Pringle,
6380 Hollywood Boulevard,
Los Angeles, California.

Year	Deficiency in Tax
1923	$3,243.85

The report of the Internal Revenue Agent in Charge at San Francisco, California, transmitted to this office under date of October 8, 1927, has been reviewed and approved as submitted.

The return has, therefore, been adjusted as shown below:

Net income reported on return		$76,993.07
Add:		
1. Fiduciary income adjustment	$ 6,466.62	
2. Capital net gain adjustment	28,134.50	34.601.12
Total net income adjusted		$111,594.19

Explanation of Adjustments.

1. Fiduciary income adjustment: The action of the examining officer in determining a profit realized instead of a loss sustained in the amount of $6,466.57 from the sale of lots in connection with property inherited has been sustained. In accordance with Article 1563, Regulations 62, Revenue

Act of 1921, the cost basis to the tenants in common in the case of a sale of property received through inheritance, is the value of the property at the time of death of the testator.

2. Capital net gain adjustment: The capital net gain of $62,900.24 reported in the return has been eliminated inasmuch as the profit realized from the sale of property by the executor of the Estate of Ida W. Beveridge represents taxable income to the estate and not the beneficiaries. However, a total amount of capital net gain of $91,034.74 from sale of other property in 1923 as shown below has been included as taxable income to you: [8]

Mrs. Marion B. Pringle Statement.

Description	Acquired	Received	Value at Inheritance	Improvements	Profit
Lots in tract					
6/5/62	8/7/14	$180,530.76	$63,750.00	$17,553.28	$ 99,227.48
Parts of lots					
7/8/9	8/7/14	95,692.00	12,850.00		82,842.00
Total profit					$182.069.48
Your proportionate share—one-half					91,034.74

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

[Endorsed]: Filed Feb. 11, 1928. [9]

[Title of Court and Cause.]

ANSWER.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar year 1923, but denies that the amount in controversy is as stated in the petition.

4 (a) and (b). Denies that any error was committed in the determination of petitioner's tax liability for 1923 as alleged in subdivisions (a) and (b) of paragraph 4 of the petition.

5 (a) to (d), inclusive. For lack of information sufficient to form a belief, denies the allegations contained in subdivisions (a) to (d), inclusive, of paragraph 5.

Denies generally and specifically each and every allegation in taxpayer's petition contained not hereinbefore admitted, qualified or denied. [10]

WHEREFORE, it is prayed that the petitioner's appeal be denied.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

PAUL L. PEYTON,
HUGH BREWSTER,
Special Attorneys,
Bureau of Internal Revenue,
Of Counsel.
ERC

[Endorsed]: Filed Apr. 13, 1928. [11]

[Title of Court and Cause.]

A true copy: Teste. B. D. GAMBLE, Clerk U. S. Board of Tax Appeals.

The testator by her will provided that trustees should hold property in trust, the income to be applied as specified, and at the end of a definitely ascertainable period distribute the property among decedent's living children, share and share alike, the children of such children to receive the parent's share. It was further provided in the will that if all the children should die without issue before the end of the trust period, the trust should terminate and the property should go to others. *Held,* that when the petitioners herein, children of the

decedent, received the property in question at the end of the trust period they received no new right, that their legal title related back to the date of death of the decedent, that the date of death of the decedent was the time of acquisition of the property by them within the meaning of section 202 of the Revenue Act of 1921, and that the value of the property at the date of death of the decedent is the proper basis for the computation of gain derived upon the sale by them of such property.

RALPH W. SMITH, ESQ., for the petitioners.
C. H. CURL, ESQ., for the respondent.

These are proceedings duly consolidated for hearing and opinion, for the redetermination of asserted deficiencies in income taxes for [12] the calendar year 1923, the deficiency in each case being the same, to-wit, $3,243.85.

It is alleged in each petition that the respondent erred (1) in computing the profit on the sale of certain real estate acquired and sold during the year 1923, and (2) in using an erroneous basis for computing gain or loss on the real estate sold during the year 1923 in that the value at the date of the death of the testator was used instead of the value at the date of distribution and acquisition by petitioner as a beneficiary under a trust created by the will of the testator.

The evidence presented consists of a stipulation entered into between the parties and certified copies

of certain documents which were admitted in evidence.

FINDINGS OF FACT.

Mrs. Ida Wilcox Beveridge, who will hereinafter be referred to as "the decedent," died on August 7, 1914, and left a will which provided as follows:

I.

I give, devise and bequeath to my husband, Philo J. Beveridge, and to my sister, Mrs. Madge Connell, all of my property of every character and description, TO HAVE AND TO HOLD NEVERTHELESS, upon the trusts and the uses and in the manner hereinafter specified, as follows:

First. To receive the rents, issues and profits of all my property, except from the Homestead hereinafter specified; and to sell the whole or any part of [13] my property, except the said Homestead, and to reinvest the proceeds thereof for like uses and trusts, and from the proceeds;

1. To build and furnish at a sum not exceeding Six Thousand Dollars ($6,000.00) upon a piece of property to be selected by them the said trustees, at Hollywood, in the county of Los Angeles, state of California, from such property as I may own at the time of my death, to be known as a Homestead, and not to exceed one (1) acre in extent.

2. When the house upon the said Homestead is constructed it shall be held in trust by my said trustees so long as my said husband or my said sister may live, and shall be used by them or the survivor of them as a home; it shall also be used as a home by any child or children which I may have living who may desire to reside in the same during the existence of this trust; and my Mother shall also have the right to reside in the said Homestead during her life.

II.

From the rest and residue of my estate, from the rents, issues and profits thereof, and from the proceeds of sale thereof, I direct my said trustees to pay all taxes, expenses and repairs on my said property, and to apply from the proceeds thereof monthly a sum not to exceed two hundred dollars ($200.00) for the support and maintenance of those persons who may reside in said Homestead, viz.: my husband, my sister, and my children, and while residing in said Homestead, under the terms of this will, as hereinbefore designated, for the period and times herein specified.

1st. A reasonable sum shall be applied for the education, clothing and maintenance of my children, Marian and Phyllis, and for any child or children which may hereafter be born to me.

2nd. Should there be a net income in excess of the above requirements, then the same is to

be divided quarterly between my children, at majority, and thereafter as received.

3rd. The trust created with respect to the said Homestead is to terminate when my said sister, and my [14] said husband shall both die, and thereupon fee simple title to said property shall descend to my heirs.

III.

The trust upon my other property hereinbefore specified shall continue throughout a period of time, which period is designated as being twenty-five (25) years from the birth of the youngest of my children who may be living at the time of my death, whether now born or hereafter to be born; provided, however, that the said trust shall cease and determine upon the death of my children if they shall all die without issue before the end of the period last hereinbefore mentioned.

IV.

Upon the expiration of the said trust, the property so devised in trust, except the said homestead, shall descend to and be distributed among such of my children as shall be living at the expiration of said trust, share and share alike; provided, however, if any child of mine shall have died, leaving child or children surviving, such child or children shall take the share which the deceased parent would have

taken if then living. And provided, further, that if my said husband shall be living at the expiration of the said trust, the whole of said property shall be charged with the payment of Two Hundred Dollars ($200) per month during his life, for his maintenance and support, which said charge shall be a lien upon the whole of said property so distributed, and shall be paid quarterly.

V.

Should all of my children die before reaching the end of the said period leaving no issue them or either of them surviving, then it is my will that the whole of said property shall be and become the property of my said sister and of my said husband, share and share alike, if they shall both be living at that time; and if my husband be not living at that time, then it is my will that the whole of said property shall be and become the property of my sister; and if my husband be then living, and my sister be then dead, leaving [15] children her surviving, then the property is to be divided one-half to my husband, and one-half to the said children of my sister; and if my husband shall then be living and my sister then be dead leaving no issue her surviving, then the said one-half of my said property shall be and become the property of my said husband, and the other half shall go to my heirs.

VI.

Should any or either of my trusts hereinbefore provided for be adjudged null by the final decree of any court, then it is my will that the property covered by such trust shall be and become the property of my children who may be living at my death.

VII.

It is my desire that the trust hereinbefore provided for shall be conducted by my said sister and my said husband; but if either one of them shall fail to qualify as such trustee, or cease to be such trustee after qualifying, then it is my will that the powers herein conferred upon them shall be exercised by that one of the said trustees.

(3)

remaining in office, and by another trustee to be appointed by the court; my will and desire being that my property shall be managed by two trustees, and that it shall take the concurring act of both trustees for the sale of my said property.

VIII.

For the purposes of this will, the trustees hereinbefore referred to are empowered to sell, convey, and transfer any part of my property without the previous consent or subsequent

approval of any court, and I empower my executor hereinafter named, to sell the whole or any part of said property, without the previous authority or approval of any court.

And I hereby nominate and appoint my said sister and my said husband the executors of this, my last will and testament, and I hereby exempt my said husband [16] and my said sister from giving bonds, either as trustees or executors; but I do not exempt any trustee who may be appointed by the court to fill the office of trustee under this will from giving bond, but it is my desire that any trustee so appointed by the court shall give bond.

IX.

It is my will and desire that my executors should employ, as attorney of my estate, and as their attorney during the execution of the said trusts hereinbefore mentioned, under this will my present adviser, Albert M. Stephens.

X.

The provision hereinbefore made for my said husband is in lieu of all claims of homestead of allowance of every kind from my said estate, and should he claim a homestead therefrom or any monthly allowance from the court, then the provisions herein made for him are revoked, and I hereby revoke all former wills by me made.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 11th day of December, 1905.

[Seal] IDA WILCOX BEVERIDGE.

The children of the decedent at the time of her death were Marian Beveridge, later Mrs. Marian B. Campbell (now Marian B. Pringle, one of the petitioners herein) and Phyllis Beveridge (now Phyllis Brunson, one of the petitioners herein). Phyllis Beveridge, the youngest daughter, reached the age of 25 years on the 25th day of July, 1923.

Philo J. Beveridge, husband of the decedent, died on or about May 1, 1921, and all of his estate, with the exception of certain specific legacies, was distributed to the petitioners herein.

On June 30, 1923, Madge H. Connell, sister of the decedent, and Amelia J. Hartell, mother of the decedent, "for a valuable [17] consideration" transferred and quitclaimed to the two petitioners, all their homestead and other rights under the will of the decedent.

The property in question was actually distributed to the petitioners, as tenants in common, share and share alike, by decree of court on July 26, 1923.

In the "First and Final Account Report and Petition for Distribution" filed on June 30, 1923, with the Probate Court by the executrix of the estate of Ida Wilcox Beveridge, the following appears:

That it is not necessary to set out the terms or conditions of said trust or to distribute said property in trust, for the reason that at the time of the presentation of this petition and account for hearing, said Phyllis B. Brunson will have, if she lives, attained the age of twenty-five years.

Lots 1 to 9, and 11 to 18, inclusive, in Tract 6562, Hollywood, California, and lots 7, 8 and 9, block 3, Hollywood, California, being a part of the land inherited by the petitioners from their mother, were sold by the petitioners in 15 parcels on dates from July 29, 1923, to August 1, 1923, for a total amount of $288,906. The selling expenses in connection with these lots were $12,683.24, and the net amount received from the sale of the lots was $276,222.76. The fair market value of all of this described property on July 25 or 26, 1923, was the same as the selling price. The fair market value of the same property at the date of the death of the decedent, Mrs. Ida Wilcox Beveridge, was $76,600, and is the value used by the respondent in determining the deficiencies herein. [18]

OPINION.

McMAHON.—In computing the profit on the sale by the petitioners in 1923 of certain property which they received under the will of their mother, Mrs. Ida Wilcox Beveridge, referred to as "the decedent," the respondent used as the basis the

value of the property at August 7, 1914, the date of the death of the decedent, to-wit, $76,600. The question here presented is whether that figure is the proper basis to be used or whether there should be used as the basis the value at July 25, 1923, the date of the termination of the trust, the value at which time was equal to the selling price of the property. In the latter event, the petitioners are not chargeable with any profit upon the sale. Section 202 of the Revenue Act of 1921 provides in part as follows:

> (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that:
>
> (3) In the case of such property, acquired by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition. * * *

Petitioners contend that what they received at the date of death of the decedent was simply a contingent remainder and that they did not *acquire* the property in question until the date of the expiration of the trust period. They argue that the trustees held an estate comparable to an intervening life estate and that the petitioners simply had a contingent remainder. None of the cases cited by petitioners hold that trustees take a beneficial interest in real property. [19] They simply sustain

the proposition that a testamentary trustee takes *legal title* to real property immediately upon the death of the testator.

Petitioners cite the following provision of the laws of California which was in effect at the date of the death of the decedent, and which provides as follows:

> Trustees of express trusts to have whole estate. Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust. [Sec. 863 of the Civil Code of California, 1927, legislation enacted March 21, 1872.]

However, in In re Fair's Estate, 132 Cal. 523, 60 Pac. 442, the Supreme Court of California stated in regard to that section:

> * * * The provision in section 863, Civ. Code, that, "except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust," is limited by the succeeding sections to the estate given to the trustee for the purposes of the trust, and does not include any estate in the property which is not

> required by the trust. Morffew v. Railroad Co., 107 Cal. 587, 40 Pac. 810. * * *

From a reading of the will it is clear that the decedent did not intend to vest in the trustees any interest except the legal title to the property, to hold in trust for the beneficiaries.

The law of California, which was in effect at the date of the death of the decedent, provided in part as follows: [20]

> § 768. Reversions. A reversion is the residue of an estate left by operation of law in the grantor or his successors, or in the successors of a testator, commencing in possession on the determination of a particular estate granted or devised.
>
> § 769. Remainders. When a future estate, other than a reversion, is dependent on a precedent estate, it may be called a remainder, and may be created and transferred by that name. [Section 769 of the Civil Code of California, 1927—legislation enacted March 21, 1872.]

Clearly the interest which the petitioners obtained upon the death of the decedent was not a remainder. Their interest under the trust was not dependent on a precedent estate.

In In re Blake's Estate, 157 Cal. 448, 108 Pac. 287, cited by petitioners, the Supreme Court of California stated:

The cardinal rule in the interpretation of a will is that "it is to be construed according to the intention of the testator." Civ. Code, § 317. As said in Estate of Young, 123 Cal. 337, 55 Pac. 1011: "The purpose of construction as applied to wills is unquestionably to arrive, if possible at the intention of the testator; but the intention to be sought for is not that which existed in the mind of the testator, but that which is expressed in the language of the will." It is not the business of the court to say, in examining the terms of a will, what the testator intended, but what is the meaning to be given to the language which he used. Where the terms of a will are free from ambiguity, the language used must be interpreted according to its ordinary meaning and legal import, and the intention of the testator ascertained thereby. It is true that presumptions are to be indulged in which will prevent intestacy (Le Breton v. Cook, 107 Cal. 410, 40 Pac. 552), and that testamentary devises are presumed to vest at the death of the testator (Civ. Code, § 1341); but these presumptions, like the auxiliary rules of construction relied on by appellant, are subordinate to the cardinal rule just stated. [21]

See also Henry J. Faulkin, et al., 13 B. T. A. 1200.

Under the laws of California there was a presumption that the property vested in the beneficiaries at the testator's death. The following provisions of the laws of California were in effect at the time of decedent's death:

> §1341. When devises and bequests vest. Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death.
>
> § 1342. When cannot be divested. A testamentary disposition, when vested, cannot be divested unless upon the occurrence of the precise contingency prescribed by the testator for that purpose. [Sections 1341 and 1342 of the Civil Code of California, 1927—legislation enacted March 21, 1872.]

Even aside from the statutory presumption, we believe, from a reading of the will, that it was the intention of the decedent that her children should receive a vested interest under the trust immediately upon her death. The statutory presumption is augmented by the intention of the testator as evidenced by the provisions of the will, particularly the following provision:

> Should any or either of my trusts hereinbefore provided for be adjudged null by the final decree of any court, then it is my will that the property covered by such trust shall be and become the property of my children who may be living at my death.

In Brewster v. Gage, 280 U. S. 327, the Supreme Court held that upon the death of the owner of personal property, there vests in his heirs or legatees immediately the right to respective distributive shares of so much as might remain after proper administration, and the right to have that share delivered upon entry of the [22] decree of distribution, but that legal title vests in the executors or administrators. The title to real estate, however, as pointed out in that case, passes to the owner's heirs or devisees immediately upon the owner's death. The court there stated:

> Petitioner's right later to have his share of the residue vested immediately upon testator's death. At that time petitioner became enriched by its worth, which was directly related to and would increase or decline correspondingly with the value of the property. And, notwithstanding the postponement of transfer of the legal title to him, Congress unquestionably had power and reasonably might fix value at the time title passed from the decedent as the basis for determining gain or loss upon sale of the right or of the property before or after the decree of distribution. And we think that, in substance, it would not be inconsistent with the rules of law governing the descent and distribution of real and personal property of decedents to construe the words in question to mean the date of death.

In the instant proceeding legal title to the property in question vested immediately upon the death of the decedent in the trustees by virtue of the provisions of decedent's will. Thus although the instant proceeding involves realty, the situation herein closely resembles that in Brewster v. Gage, supra, since the legal title did not vest immediately in the petitioners herein upon the death of the decedent. In the instant proceeding, under the principles enunciated in Brewster v. Gage, supra, there vested in the petitioners the right to their distributive shares of so much of the property as might remain at the end of the trust period, and the right to have it delivered at the end of that period. In Brewster v. Gage, supra, the executors were in the [23] position of trustees. The court pointed out, and the same is true in the instant proceeding, that the trustees did not take title for themselves but on behalf of the beneficiaries. Here also, as in Brewster v. Gage, supra, the decree of distribution conferred upon the beneficiaries no new right. It merely identified the property remaining, it evidenced the right of possession in the beneficiaries, and required the trustees to deliver the property to the beneficiaries. The legal title so given related back to the date of the death of the decedent. The petitioners' right to distribution of the property to them would be defeated only in the event of their death.

The case of Estate of Francis Abeles, et al., 24 B. T. A. 435, although involving personal property,

is also helpful in the instant proceeding. There certain stock was transferred by the testator in trust for a period not to exceed five years, at the end of which time it was to be distributed to certain beneficiaries. In that case we stated:

> We can see no essential difference, as to the principle involved, between that case [Brewster vs. Gage] and the present proceedings. There, possession and dominion by the legatees was deferred during an indeterminate period of administration; here, possession is postponed for not to exceed a five-year trust period, the legatees meanwhile receiving the income earned by the stocks. We hold, therefore, that the stocks in question were acquired upon the death of Julius D. Abeles on August 15, 1920.
>
> Cf. Security Trust Company, et al., Trustees, 25 B. T. A. 29.

At the death of the decedent these petitioners "acquired" the [24] property within the meaning of the Revenue Act.

In view of the fact that there is no remainder involved in the instant proceeding, we are not concerned with the cases dealing with remainders, such as William Huggett, 24 B. T. A. 669.

We hold that the respondent did not err in using the value of the property at the date of the death of the decedent as the basis for the computation of gain derived by petitioners upon the sale of the property.

We find nothing in the cases relied upon by petitioners which leads to a different conclusion.

Judgment will be entered for the respondent. [25]

United States Board of Tax Appeals
Washington.

Docket No. 34,943.

MARIAN B. PRINGLE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION.

Pursuant to the determination of the Board, as set forth in its report promulgated June 9, 1932, it is

ORDERED and DECIDED:

That there is a deficiency of $3,243.85 for the year 1923.

Entered Jun. 10, 1932.

[Seal] STEPHEN J. McMAHON,

Member.

A true copy teste. B. D. Gamble, Clerk U. S. Board of Tax Appeals. [26]

[Title of Court and Cause.]

PETITION FOR REVIEW BY UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Your petitioner, Marian B. Pringle, in support of this her petition filed in pursuance of the provisions of Section 1001 of the Act of Congress approved February 26, 1926, entitled the Revenue Act of 1926, as amended, for the review of the decision of the United States Board of Tax Appeals promulgated on the 9th day of June, 1932, and its judgment entered on the 10th day of June, 1932, in the case of Marian B. Pringle, Petitioner, vs. Commissioner of Internal Revenue, Respondent, number 34,943, under Docket of said Board, wherein the Board redetermined deficiencies of income taxes against the petitioner for the calendar year 1923 in the amount of $3,243.85, shows this Honorable Court as follows:

I.

STATEMENT OF THE NATURE OF THE CONTROVERSY.

(1) That on the 15th day of December, 1927, the [27] Commissioner of Internal Revenue, in accor-

dance with Section 274 of the Revenue Act of 1926, addressed a letter to the petitioner proposing a deficiency in taxes for the calendar year 1923 in the sum of $3,243.85.

(2) That within sixty days from the date of the aforesaid deficiency letter, to-wit: on or about February 11th, 1928, petitioner duly filed with the United States Board of Tax Appeals in pursuance of the provisions of the Revenue Acts properly applicable thereto, her petition requesting the redetermination of the deficiency above referred to, and said petition, docketed with the said Board under Docket No. 34,943, alleged substantially as follows:

(a) That Ida Wilcox Beveridge, the mother of petitioner, died on August 7th, 1914, and that her will, which was duly admitted to probate in the Superior Court of the State of California in and for the County of Los Angeles, contained the following conditions:

All of the estate of the deceased was devised and bequeathed to Philo J. Beveridge, surviving husband and Madge H. Connell, surviving sister of the deceased, to be held in trust with power to sell the properties or any part thereof and receive the rents, issues and profits therefrom. The trustees were also directed to set aside a part of the property not to exceed one acre [28] as a homestead, and erect thereon and furnish a residence to be used by said Philo J. Beveridge or Madge H. Connell and

the children of the deceased and also the deceased's mother. Income at the rate of $200.00 per month was set aside for the support and maintenance of those persons who might reside in the homestead. The homestead was to terminate upon the death of the survivors—Madge H. Connell and Philo J. Beveridge.

The balance of the income was made payable to the children of the deceased, who at her death were Marian Beveridge (now Marian Pringle, petitioner) and Phyllis Beveridge (now Phyllis Brunson) these parties to receive a reasonable amount for their maintenance until they reached maturity, the accumulated and undistributed balance at their maturity was to be distributed equally to them.

(b) The trust was to terminate when the youngest daughter became twenty-five years of age, or was to terminate upon the death of both of said daughters, if they should die without issue before reaching the age of twenty-five.

(c) With respect to the vesting of title in the beneficiaries, it is provided that:

1. If the two daughters be living at the termination, the property (except the homestead) 'shall descend to and be distributed among such' daughters. [29]

2. If, however, the daughters or either of them shall be then not living, but shall have

left issue, the issue shall take the share of the deceased daughter.

3. If the daughters should die without issue surviving, then the whole of the property shall pass to Madge H. Connell and Philo J. Beveridge, share and share alike with certain conditional provisions with relation to vesting in case either of them be dead, which provisions are not material here.

(d) Phyllis Beveridge, the younger daughter, reached the age of twenty-five years on the 25th day of July, 1923, and by virtue of the terms of the will, the trust terminated upon that date and the trust property vested in Phyllis Brunson and Marian Pringle, except as to the homestead rights, and as to the $200.00 per month income provided for those in the homestead. The homestead rights and the income rights of Philo J. Beveridge terminated upon his death in the year 1921 and as of the date of June 30, 1923, shortly before the trust terminated, Madge H. Connell, the sister of Ida W. Beveridge, and Amelia Bartell, the mother of Ida W. Beveridge, transferred and surrendered to Phyllis Brunson and Marian Pringle their homestead and income rights so that upon the termination of the trust, the full [30] title without any incumbrances vested in Marian Pringle and Phyllis Brunson.

(e) That petitioner acquired on July 25, 1923, under the provisions of the above named will, together with certain other property, Lots 1 to 9 and 11 to 18, inclusive, in Tract 6562, Hollywood, California, and Lots 7, 8 and 9, Block 3, Hollywood, California, which described property was sold during the year 1923 for $288,906.00. This property had a fair market value as of July 25, 1923, based on actual sales, of $271,596.72. The subsequent improvements on the said property were $17,559.28 and the total selling costs amounted to $12,683.24, which resulted in a net loss from the sale of said property of $12,933.24.

(f) That petitioner be allowed to compute the profit or loss on the sale of property received and sold during the year 1923 on the basis of calculation at the date acquired—July 25, 1923, which fair market value as fully substantiated by actual sales was $271,596.72.

(3) That thereafter within the time allowed by law the Commissioner of Internal Revenue filed with said Board his answer in said cause, Docket No. 34943, by which were raised the issues determined by said decision of the United States Board of Tax Appeals. [31]

(4) A stipulation signed by counsel for petitioner and counsel for respondent covering the material facts in issue was subsequently prepared and filed with the Board, and the proceedings were sub-

mitted to the Board upon said stipulation, the petition and the answer thereto at the time and place duly fixed for the hearing thereof.

(5) The Board promulgated its decision in said cause on June 9th, 1932, wherein it sustained the contentions of respondent, the Commissioner of Internal Revenue, and held that said deficiency was taxable to petitioner, and on June 10, 1932, entered its final order of redetermination sustaining the above mentioned deficiency for the year 1923, amounting to $3,243.85.

(6) The said decision of the Board contains a separate finding of facts and the Board also rendered an opinion thereon in writing. The formal finding of facts was taken from the stipulation signed by counsel for petitioner and respondent.

(7) The main questions involved in said controversy were whether the petitioner acquired the said realty within the meaning of the Revenue Act of 1921, on July 25th, 1923, or upon August 7th, 1914, and whether the basis of said realty for the computation of gain derived or the loss sustained by petitioner upon the sale thereof, was its value on July 25th, 1923, or its value on August 7th, 1914. [32]

II.

DESIGNATION OF COURT OF REVIEW.

Petitioner is an inhabitant of the State of California, County of Los Angeles, residing therein on property known as the "Uplifters Ranch" located

near or within the corporate limits of the City of Santa Monica, and within the Ninth Circuit, and being aggrieved by the aforesaid decision and order of the Board, desires that the same be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit within which Circuit is located the office of the Collector of Internal Revenue to whom petitioner made her income returns for the calendar year 1923 involved herein. [33]

III.

ASSIGNMENTS OF ERROR.

(1) Petitioner says that in the decision and final order rendered and entered by the Board of Tax Appeals manifest error occurred and intervened to the prejudice of the petitioner, and the petitioner assigns the following errors, and each of them, which, she avers, occurred in the said decision and final order so rendered and entered by the Board of Tax Appeals, to-wit:

1. The Board of Tax Appeals erred as a matter of law in ordering and deciding that there was a deficiency for the year 1923.

2. The Board of Tax Appeals erred in not deciding and ordering that there was no deficiency against the petitioner for the year 1923.

3. The Board of Tax Appeals erred in its decision and determination that at the death of the decedent, Ida Wilcox Beveridge, this petitioner "acquired" the property within the meaning of the Revenue Act.

4. The Board of Tax Appeals erred in its decision and determination that the respondent did not err in using the value of the property at the date of the death of decedent, Ida Wilcox Beveridge, as the basis for the computation of gain derived by petitioner upon the sale of the property. [34]

5. The Board of Tax Appeals erred in its decision and determination that from a reading of the will it is clear that the decedent did not intend to vest in the trustees any interest except the legal title to the property, to hold in trust for the beneficiaries.

6. The Board of Tax Appeals erred in its decision and determination that clearly, the interest which the petitioner obtained upon the death of the decedent was not a remainder, and that her interest under the trust was not dependent on a precedent estate.

7. The Board of Tax Appeals erred in its decision and determination that under the laws of California there was a presumption that the property vested in the beneficiaries at the testator's death.

8. The Board of Tax Appeals erred in its decision and determination that in the instant proceeding legal title to the property in question vested immediately upon the death of the decedent in the trustees by virtue of the provisions of decedent's will.

9. The Board of Tax Appeals erred in its determination that the petitioner acquired the said realty within the meaning of the Revenue Act of 1921, on July 25th, 1923.

10. The Board of Tax Appeals erred in its failure and refusal to determine that the petitioner acquired the said realty within the meaning of the Revenue Act of 1921 on August 7th, 1914. [35]

11. The Board of Tax Appeals erred in refusing and failing to determine that the basis of said realty for the computation of gain derived or the loss sustained by petitioner upon the sale thereof, was its value on July 25th, 1923.

12. The Board of Tax Appeals erred in determining that the basis of said realty for the computation of gain derived or the loss sustained by petitioner upon the sale thereof was its value on August 7th, 1914.

WHEREFORE, the petitioner prays that this Honorable Court may review said decision, opinion and order of the Board; that it reverse and set aside the same; that it direct the United States Board of Tax Appeals to determine that no deficiency is due by the petitioner in this proceeding; and for such other and further relief as the Court may deem meet and proper in the premises.

MARIAN B. PRINGLE,
Petitioner.

RAYMOND W. STEPHENS,
Attorney for Petitioner. [36]

State of California,
County of Los Angeles.—ss.

Marian B. Pringle, being duly sworn, says that she is the Petitioner in the above entitled matter; that she knows the contents of the foregoing petition for review by United States Circuit Court of Appeals for the Ninth Circuit, of decision of the United States Board of Tax Appeals; that she is informed and believes that the statements therein contained are true and that the assignments of error are well taken and intended to be argued.

MARIAN B. PRINGLE.

Subscribed and sworn to before me this 3rd day of September, 1932.

[Notarial Seal] FLORENCE M. SAMPSELL,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires July 6, 1934.

[Endorsed]: Filed Sept. 7, 1932. [37]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the United States Board of Tax Appeals:

Please prepare and issue a certified transcript of record in the above-entitled case on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, consisting of the following documents:

1. Docket entries of proceedings before the United States Board of Tax Appeals.

2. Pleadings before said Board.

3. Findings of fact, opinion, and decision of said Board.

4. Petition for review by the United States Circuit Court of Appeals for the Ninth Circuit.

5. This praecipe.

You will please duly certify said documents as correct and transmit them to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit within sixty (60) days from September 7th, 1932, the date of the filing of the petition for review and notice in the above entitled case.

RAYMOND W. STEPHENS,
629 South Spring Street,
Los Angeles, California,
Attorney for Petitioner.

[Endorsed]: Filed Sept. 19, 1932. [38]

[Title of Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 38, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 14th day of October, 1932.

[Seal] B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

[Endorsed]: No. 6994. United States Circuit Court of Appeals for the Ninth Circuit. Marian B. Pringle, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed October 29, 1932.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6995

United States
Circuit Court of Appeals
For the Ninth Circuit

PHYLLIS B. BRUNSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

In the United States Circuit Court of Appeals for the Ninth District.

MARIAN B. PRINGLE,
Petitioner,
vs. No. 6994

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PHYLLIS B. BRUNSON,
Petitioner,
vs. No. 6995

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STIPULATION AND PETITION FOR CONSOLIDATION OF CASES FOR HEARING AND DECISION AND FOR PRINTED TRANSCRIPT OF RECORD.

FIRST. IT IS HEREBY STIPULATED:

(a) That the above entitled Pringle case, No. 6994, arises out of a petition filed by Marian B. Pringle for a review of the decision of the United States Board of Tax Appeals promulgated on the

9th day of June, 1932, and its judgment entered on June 10th, 1932, under Docket No. 34,943 of said Board.

(b) That the above entitled Brunson case, No. 6995, arises out of a petition filed by Phyllis B. Brunson for a review of the decision of the United States Board of Tax Appeals promulgated on the 9th day of June, 1932, and its judgment entered on June 10th, 1932, under Docket No. 34,944 of said Board.

(c) That, under a stipulation of the parties, said cases, when pending before the Board of Tax Appeals, were consolidated for hearing and decision and that the Board rendered one decision applicable to both cases.

(d) That each of said cases involved the liability of the petitioner for a deficiency in income taxes claimed by the Commissioner in respect to alleged profits from sales, made in the year 1923, of realty owned by said Pringle and said Brunson, each of whom owned an undivided one-half interest in said realty.

(e) That the deficiency claimed against each of said individuals is in the same amount and that the facts and law involved in each case are identical.

(f) That the record, certified and transmitted to this Court by the Clerk of the Board of Tax Appeals, in the Pringle case, No. 6994, is identical with that so certified and transmitted in the Brunson case, No. 6995, except that, throughout each docu-

ment other than the decision of the Board, the name of Marian B. Pringle appears instead of the name Phyllis B. Brunson, and the name Phyllis B. Brunson appears instead of the name Marian B. Pringle.

SECOND. IT IS FURTHER STIPULATED:

That said two cases, to-wit: the petition for review bearing Number 6994 and the petition for review bearing Number 6995 may be consolidated for hearing and decision in the above entitled Court, and that each brief filed by counsel shall be in, and have application to, such consolidated cases.

THIRD. IT IS FURTHER STIPULATED:

That the record, heretofore certified and transmitted by the Clerk of the Board of Tax Appeals to the above entitled Court, in the Pringle case, No. 6994, shall be printed in full under the supervision of the Clerk of the above entitled Court; that this stipulation shall be printed and added thereto; and that the same shall be used as the printed record or transcript in said consolidated cases.

FOURTH. IT IS FURTHER STIPULATED:

That the record, heretofore certified and transmitted by the Clerk of the Board of Tax Appeals to the above entitled Court, in the Brunson case, No. 6995, need not, nor need any part thereof, be printed.

The undersigned, counsel for the parties, do hereby respectfully petition the above entitled Court to make such Order, if any, as may be deemed appropriate to give effect to the foregoing stipulation.

RAYMOND W. STEPHENS,
Attorney for
Marian B. Pringle, Petitioner, and
Phyllis B. Brunson, Petitioner.
C. M. CHAREST,
Attorney for Respondent.

SO ORDERED:
CURTIS D. WILBUR,
Senior U. S. Circuit Judge.
San Francisco, California,
November 15, 1932.
[Endorsed]: Filed Nov. 15, 1932.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Marian B. Pringle, *Petitioner,* *vs.* Commissioner of Internal Revenue, *Respondent.*	6994
Phyllis B. Brunson, *Petitioner,* *vs.* Commissioner of Internal Revenue, *Respondent.*	6995

PETITIONERS' OPENING BRIEF.

RAYMOND W. STEPHENS,
JOSEPH D. PEELER,
California Bank Bldg., 629 S. Spring, L. A.,
Attorneys for Petitioners.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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TABLE OF CASES.

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vs.
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Respondent.

Phyllis B. Brunson,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.

PETITIONERS' OPENING BRIEF.

STATEMENT OF THE CASE.

Questions Involved and How Raised.

Each of these cases comes to this court on a petition to review the decision and order of the United States Board of Tax Appeals, sustaining the Commissioner in the determination of a tax deficiency against each petitioner amounting to $3,293.85, in respect to income for the year 1923.

The proceedings before the Board arose under petitions filed by the petitioners for redetermination of the Commissioner's proposed deficiencies, each in the above amount. The cases were there consolidated and disposed of in one decision. [Tr. p. 14 *et seq.*]

The facts and questions in the two cases are identical. On stipulation of the parties and by order of this court [Tr. p. 47 *et seq.*] the cases have been consolidated for hearing and determination here, provision having been made by such stipulation for one printed transcript to serve in both cases.

The proposed deficiencies rested solely upon alleged gains from sales of certain realty made by petitioners within seven days after fee simple title thereto had vested in them. Such title vested on July 25, 1923, by virtue of a devise upon conditions precedent contained in the will of their mother, who died August 7, 1914. During the period between August 7, 1914, and July 25, 1923, an estate of the nature hereinafter pointed out in said realty had been held by trustees under a devise in said will. Upon the expiration of the trustees' estate on June 25, 1923, fee title was taken by petitioners as devisees under the will and by virtue of a devise upon conditions precedent, which conditions were not performed until July 25, 1923.

The Commissioner's contention, sustained by the Board, is that petitioners acquired the property upon the death of the decedent in 1914 and that the appreciation in value between that date and the dates of sales constituted gain taxable to petitioners.

Petitioners contend that July 25, 1923, constituted the acquisition date, and that since, as stipulated and found [Tr. p. 23], there was no increase between that date and the times of sale, no taxable gain was realized by them.

The disposition of these cases, therefore, involves only:

(a) A consideration of the terms of the will and the statutes and decisions of California to determine the nature and extent of the rights in said realty taken (1) by the trustees and (2) by petitioners; and

(b) The construction and application of section 202 of the Internal Revenue Act of 1921, which provides that in determining gain or loss resulting from sale of *"property"* acquired by devise, the basis shall be the value "at the time of such acquisition."

The ultimate question to be answered is:

When, within the meaning of such section, did the petitioners *acquire* the realty here involved?

If the realty was acquired in 1914, the order of the Board must be affirmed. If acquired in 1923, the order must be reversed.

The relevant portions of section 202 are quoted by the Board at transcript, page 24, as follows:

> "Section 202 of the Revenue Act of 1921 provides, in part, as follows:
>
> "(a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that:

"(3) In the case of such property, acquired by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition. * * *"

STATEMENT OF CASE (Continued).

Facts.

The will of the decedent appears in full in the findings of the Board [Tr. p. 16 *et seq.*].

We here list the persons and classes interested under such will, followed by relationship and other relevant data, together with a descriptive name by which each will be called to facilitate the discussion:

Ida Wilcox Beveridge—"Mrs. Beveridge"—the decedent, died August 1st, 1914.

Philo J. Beveridge—"Husband Beveridge"—husband of Mrs. Beveridge, died May 1st, 1921.

Marian B. Pringle—"Marian"—petitioner, elder daughter of Mrs. Beveridge, living July 25, 1923.

Phyllis B. Brunson — "Phyllis" — petitioner, younger daughter of Mrs. Beveridge, living July 25, 1923.

Note: These two daughters were the only children of decedent.

Amelia Hartwell—"Mother Hartwell"—mother of Mrs. Beveridge, living June 20, 1923.

Madge H. Connell—"Sister Connell"—sister of Mrs. Beveridge, living June 20, 1923.

Children then born or later born to Marian—"Grandchildren by Marian."

Children then born or later born to Phyllis—"Grandchildren by Phyllis".

Issue of Madge H. Connell—"Connell Issue".

Philo J. Beveridge and Madge H. Connell and their successors in trust—"Trustees".

Will of Decedent and Trusts.

The entire estate of the decedent was initially devised and bequeathed to Husband Beveridge and Sister Connell, as trustees. The general trust provisions were limited by special directions in respect to a homestead to be set aside by the trustees and an income for the occupants thereof, creating what we will call, for convenience, the "Homestead Department" of the trust.

In the Homestead Department was to be set aside by the trustees a lot, not to exceed an acre, upon which was to be erected and furnished a residence to cost not over $6,000. The parties who were given the right to reside in the homestead are: Husband Beveridge, Sister Connell, and Mother Hartwell, each for the term of his or her life. Daughters Marian and Phyllis were given a right to live there "during the existence of this trust."

The trustees were given the power, while the trust was in effect, to receive the rents, etc., to sell property (homestead excepted) [Tr. p. 16 *et seq.*], to reinvest proceeds of sale, to distribute income, and in the particular cases hereinafter mentioned, to distribute principal.

In subdivision II [Tr. p. 17] the trustees are directed to use not only income but also proceeds from sales of principal assets to pay "taxes, expenses and repairs" on the trust property; also to provide funds not to exceed

$200 per month "for the support and maintenance of those persons who may reside in said homestead."

The trustees are also directed to use a reasonable sum—without any clear designation of, but without any limitation in respect to, the source of the money—for the education, clothing and maintenance of the children of the decedent.

Net income, if any, in excess of the above-mentioned requirements was to be "divided quarterly between my children, at majority, and thereafter as received."

The general provisions for termination and the takers on termination differ from those applicable to the homestead.

Termination of Homestead Department and Takers on Termination.

The will provides, at transcript, page 18:

> "The trust created with respect to the said homestead is to terminate when my said sister, and my said husband shall both die, and thereupon fee simple title to said property shall descend to my heirs."

Termination and Takers of Corpus-Homestead Excepted.

Subdivision III [Tr. p. 18] fixes the date of termination as twenty-five years after the date of birth of the youngest child (Phyllis), with provisions for earlier termination in case of prior deaths. Both daughters survived, Phyllis attaining the age of 25 on July 25, 1923 [Tr. p. 22].

Subdivisions IV [Tr. p. 18] and V [Tr. p. 19] designate the takers of the trust assets on termination. These subdivisions follow:

IV.

"Upon the expiration of the said trust, the property so devised in trust, except the said homestead, shall descend to and be distributed among such of my children as shall be living at the expiration of said trust, share and share alike; provided, however, if any child of mine shall have died, leaving child or children surviving, such child or children shall take the share which the deceased parent would have taken if then living. And provided, further, that if my said husband shall be living at the expiration of the said trust, the whole of said property shall be charged with the payment of two hundred dollars ($200) per month during his life, for his maintenance and support, which said charge shall be a lien upon the whole of said property so distributed, and shall be paid quarterly."

V.

"Should all of my children die before reaching the end of the said period leaving no issue them or either of them surviving, then it is my will that the whole of said property shall be and become the property of my said sister and of my said husband, share and share alike, if they shall both be living at that time; and if my husband be not living at that time, then it is my will that the whole of said property shall be and become the property of my sister; and if my husband be then living, and my sister be then dead, leaving children her surviving, then the property is to be divided one-half to my husband, and one-half to the said children of my sister; and if my husband shall then be living and my sister

then be dead leaving no issue her surviving, then the said one-half of my said property shall be and become the property of my said husband, and the other half shall go to my heirs."

It thus appears that on termination of the trust, the trust assets (homestead excepted), if any, then remaining, in whatever form they might be—either original or substituted resulting from sales and reinvestments—would be taken, subject to the lien of the $200 per month annuity of Husband Beveridge, by the issue of Mrs. Beveridge, if any, living at the time of termination, such issue to take per stirpes. *Survival on date of termination was a condition precedent to taking;* that is to say, Marian would not take if not then living, nor would grandchildren by Marian take if not then living, nor would Phyllis, if not then living, nor would grandchildren by Phyllis, if not then living.

In absence of then living issue of Mrs. Beveridge, the taker or takers on termination would be found among Husband Beveridge, Sister Connell, the Connell issue, and the heirs of Mrs. Beveridge, the survival of the taker being a condition precedent to his or her taking under certain contingencies and in others it is not.

Elimination of Adverse Interests and Distribution of Estate.

Husband Beveridge died in 1921. Under his will [Tr. p. 22] Marian and Phyllis succeeded to his interest in the homestead.

The Board finds that: "On June 30, 1923, Madge H. Connell, sister of the decedent, and Amelia J. Hartwell,

mother of the decedent, 'for a valuable consideration,' transferred and quit claimed to the two petitioners, all their homestead and other rights under the will of the decedent." [Tr. p. 22.]

All adverse interests and claims against the trust estate were removed or were vested in Marian and Phyllis by virtue of (a) the survival of Marian and Phyllis on the latter's twenty-fifth birthday, (b) the death of Husband Beveridge, terminating his right to a lien for an annuity at the rate of $200 per month, (c) his will, and (d) the transfer by Sister Connell and Mother Hartwell, with the result that the entire estate of the decedent was distributed to Marian and Phyllis by order of court [Tr. p. 22] on July 26, 1923, one day after Phyllis attained her twenty-fifth year, the estate having been held in probate during the period up to that date.

The record discloses no reason for this delay in distribution, but it is of no consequence, since in California no title passes to the administrator or executor.

Brenham v. Story, 39 Cal. 179;
Martinovish v. Marsicano, 137 Cal. 354.

Property Sold and Hereinafter Denominated as the Hollywood Lots.

It appears from the findings [Tr. p. 23] that the property, the sale of which gives rise to the controversy here, consisted of 17 lots in one tract and 3 in another, all located in Hollywood, Los Angeles, California, and being a *part* of the land inherited by petitioners. To distinguish these lots from other parts of the estate, we will call them the "Hollywood lots".

SPECIFICATION OF ERRORS.

Since petitions to review of this nature are not referred to in Rule 24, paragraph 2, subdivision (b), we are attempting compliance as nearly as may be, by inserting in full our assignments of error as they appear in our petition at transcript, page 29 *et seq.* While, as a precautionary measure, certain of the assignments were stated conversely and various of them overlap various others, in effect they operate in the ultimate analysis to specify that the Board erred in its ultimate conclusion, as well as in the reasoning upon which such conclusion was based, that petitioners acquired said realty within the meaning of said section 202 in 1914 rather than in 1923. The errors relied on by each petitioner are, therefore, set out separately and particularly as follows, to-wit:

1. The Board of Tax Appeals erred as a matter of law in ordering and deciding that there was a deficiency for the year 1923.

2. The Board of Tax Appeals erred in not deciding and ordering that there was no deficiency against the petitioner for the year 1923.

3. The Board of Tax Appeals erred in its decision and determination that at the death of the decedent, Ida Wiicox Beveridge, this petitioner "acquired" the property within the meaning of the revenue act.

4. The Board of Tax Appeals erred in its decision and determination that the respondent did not err in using the value of the property at the date of the death of decedent, Ida Wilcox Beveridge, as the basis for the computation of gain derived by petitioner upon the sale of the property.

5. The Board of Tax Appeals erred in its decision and determination that from a reading of the will it is clear that the decedent did not intend to vest in the trustees any interest except the legal title to the property, to hold in trust for the beneficiaries.

6. The Board of Tax Appeals erred in its decision and determination that, clearly, the interest which the petitioner obtained upon the death of the decedent was not a remainder, and that her interest under the trust was not dependent on a precedent estate.

7. The Board of Tax Appeals erred in its decision and determination that under the laws of California there was a presumption that the property vested in the beneficiaries at the testator's death.

8. The Board of Tax Appeals erred in its decision and determination that in the instant proceeding legal title to the property in question vested immediately upon the death of the decedent in the trustees by virtue of the provisions of decedent's will.

9. The Board of Tax Appeals erred in its determination that the petitioner acquired the said realty within the meaning of the Revenue Act of 1921 on July 25th, 1923.

10. The Board of Tax Appeals erred in its failure and refusal to determine that the petitioner acquired the said realty within the meaning of the Revenue Act of 1921 on August 7th, 1914.

11. The Board of Tax Appeals erred in refusing and failing to determine that the basis of said realty for the

computation of gain derived or the loss sustained by petitioner upon the sale thereof, was its value on July 25th, 1923.

12. The Board of Tax Appeals erred in determining that the basis of said realty for the computation of gain derived or the loss sustained by petitioner upon the sale thereof was its value on August 7th, 1914.

HOMESTEAD DEEMED EXCEPTED.

Since the balance of this brief will be devoted mainly to the general trust provisions, we ask the court and counsel to assume that the language hereinafter contained, insofar as it refers to the trust provisions and trust assets, shall at all places be deemed to have excepted the Homestead Department save where the same is expressly mentioned. Such assumption is asked to promote brevity and eliminate, throughout this brief, numerous interjections such as "the Homestead Department excepted".

BRIEF OF THE ARGUMENT.

Points of Law.

These will fall into two general classifications, and will be discussed in the following order: First, California law as determining the nature of the estates or rights of the various devisees under the will of Mrs. Beveridge, in respect to the Hollywood lots, and, second, what might be called "income tax law", involving the construction and application of the Internal Revenue Act, to determine when petitioners "acquired" the Hollywood lots within the meaning thereof.

Points Under California Law.

The rights and title to said lots were dependent upon and fixed by California law, under which we submit:

(a) That the will operated to vest in the trustees such title, but only such title, as was required for the execution of the trusts.

(b) That the trustees took in the lots a title in fee simple limited upon a condition subsequent that upon the expiration of the trust the trustees' title to said lots would terminate in the event that they had failed to sell the same or to devote them to prior trust uses during the existence of the trust.

(c) That the devises to the final takers on the termination of the trust were upon conditions precedent.

(d) That none of such devises took effect, nor could any title in the lots vest in any of the persons or classes among whom the final takers might be found, until the performance of such conditions.

(e) That the conditions precedent upon which the lots had been devised to petitioners were not performed until July 25, 1923.

(f) That while, prior to July 25, 1923, petitioners had, as did each other of the numerous possible final takers have, an inchoate right, a mere expectancy, none of them possessed an estate or title of any nature in said lots.

(g) That when the devise to them became effective in 1923, petitioners did not claim or take the lots in question as the successors in interest of, or under, or through, the trustees, or as beneficiaries of the trust, but that in 1923 they took title solely under, and by virtue of, the conditional devise in said will.

Nature and Extent of Trustees' Title.

Provisions of the California Civil Code applicable are as follows:

> "Sec. 863. Trustees of express trusts to have whole estate. Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust.
>
> "Sec. 866. Interests remaining in grantor of express trust. Where an express trust is created in relation to real property, every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust or his successors."

Our Supreme Court has held that section 863 is limited by section 866, and that a trustee takes only such estate as is required for the execution of the trust.

To this effect see quotation involving a testamentary trust from *Estate of Fair* in opinion of Board [Tr. p. 25].

In *Nichols v. Emery* (41 Pac. 1098), 109 Cal. 323, at page 330, construing a deed, it is said:

> "The trustee takes the whole estate necessary for the purposes of the trust. All else remains in the grantor."

In respect to testamentary trustees, the court, in *Estate of Blake* (108 Pac. 287), 157 Cal. 448, at page 460, says:

> "The trustees simply took the legal title to the trust property to the extent that it was necessary for the fulfillment of their trust duties."

What estate in the Beveridge trustees was "necessary" or "required" for the trust purposes? That estate, whatever it was, but nothing more, vested in them under the devise.

They, of necessity, took the estate required for the execution of those parts of the trusts set up for the individual beneficiaries, a resume of whose rights is as follows:

(a) Homestead rights in Husband Beveridge, Mother Hartwell, Sister Connell, Marian and Phyllis.

(b) Rights in the above-named parties to have the income and proceeds of sale of capital used to pay "taxes, expenses and repairs" on the homestead.

(c) Rights in the above-named parties to have the income and proceeds of sale of capital used to pay up to $200 per month for their support while residing in the homestead.

(d) Rights in Marian and Phyllis to a reasonable sum for "education, clothing and maintenance".

(e) Rights in Marian and Phyllis to excess income, if any, commencing with and following majority.

It is to be noted that petitioners took as *beneficiaries* of the trust or *under* the trustees nothing whatever save as above summarized.

The trust being one "to sell" [Tr. p. 16], the Beveridge trustees also took a fee simple title limited upon the condition subsequent hereinafter set out. In the event of purchase, the buyer would take and have a full and unconditional fee, claiming under the trustees and by virtue of the trustees' sole grant. Joinder by any or all of those who might otherwise have ultimately taken the realty was not essential. A fee title during the existence of the trust was "necessary" and was "required" for the trust purposes.

It may, therefore, be properly said that the trustees took a full fee limited upon a condition subsequent that unless they had conveyed to a purchaser prior thereto, their title would expire upon the happening of the event operating to terminate the trust.

The California Civil Code contains the following two sections:

> "Sec. 707. Fixing the time of enjoyment. The time when the enjoyment of property is to begin or end may be determined by computation, or be made to depend on events. In the latter case, the enjoyment is said to be upon condition.
>
> "Sec. 708. Conditions. Conditions are precedent or subsequent. The former fix the beginning, the latter the ending, of the right."

In the California Civil Code, prior to the amendments of the year 1931, appeared the following sections:

> "Sec. 1345. Conditional devises and bequests. A conditional disposition is one which depends upon the occurrence of some uncertain event, by which it is either to take effect or be defeated.
>
> "Sec. 1349. Conditions subsequent, what. A condition subsequent is where an estate or interest is so given as to vest immediately, subject only to be divested by some subsequent act or event."

The devise in fee to the Beveridge trustees depended upon the occurrence of an uncertain event, namely, a sale of the property prior to the termination of the trust. Their failure to sell operated to divest them of the fee on the date of termination.

Incidents of Futue Interests and Rights of Final Takers.

It is to be noted that the final takers did not take under or through the trustees, as the Board apparently assumed they did. The trust was not one "to convey". Such a trust prior to the 1913 amendment of section 857 of the Civil Code would have been void under the doctrine set out in the *Estate of Fair* (64 Pac. 1000, 132 Cal. 523, where it is said, at page 527:

> "In determining whether or not the trusts declared in the fifteenth clause are valid, the primary and most important consideration is that an express *trust to convey* real property to beneficiaries is not lawful under the statutes of this state, but is by such statutes forbidden."

The directions to the trustees in the *Fair Estate* were to "transfer and convey" the trust property to final takers. The will in the instant case avoided the vitiating effect of the decision in the Fair case by providing that on the termination the property remaining "shall descend to and be distributed among" or shall be taken by [Par. IV, Tr. p. 18], or "shall be and become the property of" or "shall be divided between" or "shall go to" [Par. V, Tr. p. 19].

The foregoing provisions operated as conditional devises under which the final taker would claim upon the expiration of the trust. No transfer or conveyance to them by the trustees was necessary or required. (See quotation hereinafter contained from *Estate of Blake,* 157 Cal. 448, directly so holding, in the testamentary trust there involved.)

The devise, however, did *not* operate to vest forthwith in the numerous individuals and classes, among whom the final takers might be found, any title in the realty, since the devise to them was upon conditions precedent. Each acquired under the devise an inchoate right, a mere expectancy—not an estate or interest in the realty—which might, under certain contingencies and upon the termination of the trust, attain the dignity of a title in any one or in more than one of the numerous individuals and classes.

In the California Civil Code, in effect prior to the amendments of 1931, were the following sections:

> "Sec. 1345. Conditional devises and bequests. A conditional disposition is one which depends upon the occurrence of some uncertain event, by which it is either to take effect or be defeated.

"Sec. 1346. Condition precedent, what. A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect.

"Sec. 1347. Effect of condition precedent. Where a testamentary disposition is made upon a condition precedent, nothing vests until the condition is fulfilled, except where such fulfillment is impossible, in which case the disposition vests, unless the condition was the sole motive thereof, and the impossibility was unknown to the testator, or arose from an unavoidable event subsequent to the execution of the will."

Save for the devise to the trustees and the homestead devise, each and every devise contained in the will of Mrs. Beveridge depended upon the occurrence "of some uncertain event, by which it" was "to take effect". The conditions were precedent with the effect that "nothing vests until the conditions are fulfilled".

As to each and every parcel of realty left by Mrs. Beveridge, its disposition to the final takers under subdivisions IV and V of the will [Tr. pp. 18 and 19] depended upon an uncertain event, namely, the presence at termination of such parcel in the hands of the trustees not chosen by them as the homestead and not sold by them. The trustees might have sold such parcel, or they might have allocated the whole or a part thereof to the Homestead Department, in either of which events such parcel would not pass under, or in anywise be affected by, the devises in subdivisions IV and V.

Furthermore, the gift to the persons and classes, eight in number, designated as final takers, depended upon some

future uncertain event or events, namely, survival, birth or death, as a condition precedent to taking, for examples:

Daughter Marian would take nothing unless she survived.

Grandchildren by Marian, who would take nothing unless Marian had died, must themselves have been born, and must have been living at the termination of the trust.

Husband Beveridge and Sister Connell would take nothing in absence of the deaths, prior to termination, of daughters Marian and Phyllis and their respective issue, if any, and so on.

Daughters Marian and Phyllis, the petitioners, ultimately acquired title to the particular realty involved in this case under the devise upon conditions precedent contained in subdivision IV in the will which were not performed until July 24, 1923. Until that date the devise did not take effect and nothing vested (C. C., secs. 1346-1347, quoted *supra.*)

Estate of Blake Controlling.

Various of our points in respect to the conditional and contingent nature of petitioners' future interests are squarely and clearly sustained by the well-considered opinion in the *Estate of Blake,* 157 Cal. 448 (108 Pac. 287), decided by the Supreme Court in bank. In fact it is a rarity in a contested case to find a decision "on all fours" as is this one. Since this is the only additional authority which we will use on the California law, and since the opinion covers 24 pages, many of which treat points not material here, we will devote considerable space

to the facts and quotations, limiting the same, however, strictly to passages which are relevant here. We have run the *Shepard California Citator* to date on this case, finding numerous citations, but none on the instant points save *Estate of Whitney* (167 Pac. 399, 176 Cal. 12, where, at page 22, *Estate of Blake* is cited with approval on the subject of contingent remainders.

In *Estate of Blake* (108 Pac. 287), 157 Cal. 448, the testamentary disposition (quoted from page 452) was as follows:

> "After the payments of the bequests enumerated in article III, I direct my said executrix, executors and trustees to convert the rest and residue of my personal estate, if any there be, into money, and to invest the same in improved real property, and to hold all the rest and residue of my estate and pay over the net income therefrom in equal proportions quarterly to my said daughters, Alice S. Blake and Nellie F. Witcher, and my granddaughter, Ethel Pomroy, until they shall respectively arrive at the age of thirty years, and as each of my said daughters and granddaughter arrives at the age of thirty years she shall have the right to demand and receive one-third of the rest and residue of my said estate as her distributive share thereof, and to have and hold the same to her and her heirs forever, *and if either of my said daughters or granddaughter shall die without issue and before she receives her distributive share of my estate, it is my desire that her share of my said estate shall go to the surviving daughter, daughters or granddaughter as the case may be, share and share alike.*"

The estate having been distributed in accordance with the will, the controversy arose many years later in respect to the one-third of the corpus to be taken by the granddaughter Ethel Pomroy (hereinafter called "Ethel") as she attained the age of thirty years. Ethel was nine years old at the date of the death of the testator. She died intestate in her twenty-eighth year, leaving as her heirs her husband, one Soule, and two minor children. The controversy was three-cornered.

The two daughters of the testator contended that the testator had died intestate in respect to the future interest in the Ethel third, since the will made no express disposition thereof in case Ethel should die *with* issue.

Soule, as administrator of Ethel's estate, contended that the Ethel future interest constituted a vested remainder which passed to her heirs, of whom he was one.

The contention of the guardian of Ethel's children is stated at page 455, as follows:

> "On behalf of the surviving minor children it is insisted that even if the contingency by which their mother was to take the corpus of the estate—the attainment of the age of thirty years—did not happen and the fee of the property therefore never vested in her, still the testator did not fail to dispose of the trust property, but, on the contrary, they insist that the trust clause providing for a devise over on the death of their mother '*without issue* and before she received her distributive share' was a devise by implication to them of such corpus as her issue; that even if the devise failed to vest in fee in their mother, they took the property as donees or purchasers under the will itself as a devise in their favor. * * *"

The court rejected the intestacy theory, holding with the guardian, that there was a devise by implication of the Ethel third to her issue, if any, in the event of her death under 30 years of age. This subject occupying much space is of no interest in the instant cases.

However, the portions of the opinion disposing of the conflicting claims between Soule, as administrator, on the one hand, and the guardian of his children, on the other, in which the nature of Ethel's rights were adjudicated, are directly in point. Since the dispute was over the identity of the final takers of the assets in their condition as released from the trust upon the expiration of the trustees' estate therein, the court, in dealing with the problem, was concerned only to classify the interim rights of the final takers to whatever might remain. These they classified as contingent remainders, arising as they did under conditional devises dependent only upon survival on the one hand or birth on the other, as conditions precedent to taking. No question was raised for direct adjudication similar to the additional point which we make in the instant case, namely, that in respect to the Hollywood lots as such, independent of the conglomeration of final assets, the rights of petitioners were further conditioned upon the presence of these lots in the corpus of the trust upon the termination date. Although our point in this respect was not directly adjudicated, it finds support in the various principles which were laid down, and which were necessary to the decision, in the *Estate of Blake*.

The contention of Soule in the *Blake* case is stated in greater detail at pages 454-55 as follows:

"As far as the appellant—the administrator of the estate of Ethel Pomroy Soule—is concerned, it is insisted that under the will and decree devising and distributing the trust property to the trustees there was vested immediately in Ethel Pomroy on the death of the testator a remainder in fee in said property (possession only being deferred) defeasible only upon a condition subsequent—namely, her death 'without issue and before she received her distributive share' (attaining the age of thirty years), the happening of which has now become impossible, and that on her death the *corpus* of the trust property passed to her heirs in fee simple"

In disposing of this contention, the court, at page 458, says, in part:

"Counsel on both sides in support of their respective positions have brought to their aid much of the abstruse learning which has been devoted to the subject of remainders. There is no subject in the law to which more refinement of learning has been applied, nor one where, particularly in ascertaining whether a remainder is a contingent or vested one, more nice, technical, and shadowy rules of construction have been formulated. * * * As to these rules, however, it may be said that there are none of them which may be taken as an unvarying standard by which the meaning or intent of all testamentary devises in remainder may be construed. * * * They are simply subordinate rules of construction which are applied only in the absence of all other indications in the will to the contrary and in support of an intention on the part of the testator to create a vested remainder."

Further, at page 459:

"Now, coming to a consideration of the terms of the trust itself, we think that the language of the testator, given its legal import, clearly shows that only a contingent remainder was devised to Ethel Pomroy and that as far as that question is concerned the trial court properly so held.

"There can be no question as to the rule relative to contingent and vested remainders and the difference between them. The difficulties which have filled the books with dissertations on the subject have arisen in an endeavor to determine from indefinite terms of devise to which class the remainder belongs. The general rule is that where the legacy or devise is given to a person to be paid at a future time, it vests immediately. When, however, it is not given until a future time it is contingent and does not vest until that time occurs. As said in the note to Goebel v. Wolf, 113 N. Y. 405 (10 Am. St. Rep. 470, 21 N. E. 388), quoted approvingly by this court in *In re* Rogers, 94 Cal. 526, 530 (29 Pac. 962): 'The leading inquiry upon which the question of vesting or not vesting turns is, whether the gift is immediate, and the time of payment or of enjoyment only postponed, *or is future and contingent, depending upon the beneficiary arriving of age, or surviving some other person, or the like.* * * * According to the prevailing doctrine, a postponement of the time of payment will not of itself make a legacy contingent unless it be annexed to the substance of the gift; or, as it is sometimes put, unless it be upon an event of such a nature that it is to be presumed that the testator meant to make no gift unless that event happened. Thus, where the legacy is given, payable or to be paid when the legatee attains the age of

twenty-one years, the legacy vests immediately upon the death of the testator. It is a present gift, the time of payment only being postponed; but where the time is annexed, not to the payment only, but to the gift itself—as when the legacy is given to the legatee at twenty-one, or "if" or "when" he attains the age of twenty-one—the legacy does not vest until the legatee attains that age. His attaining the age specified is a condition precedent; and if the condition be not fulfilled the legacy never vests.'

"Examining the trust provisions of the will under this clear distinction between vested and contingent remainders, and giving to the language used by the testator its proper legal import, *we perceive no room for question but that the attainment of the age of thirty years by the beneficiary, Ethel Pomeroy, was made a condition precedent to the vesting of the corpus of the trust property in her, both in title and possession, and, hence, the devise was of a contingent remainder.*

"This conclusion reasonably follows, whether we look at the provisions of the trust separately or view them collectively. The testator had devised the legal title in the trust property to his trustees and in the first portion of the trust clause, as far as the beneficiaries, including Ethel Pomroy, are concerned, provided only for the payment to them of the net income of the estate in equal proportions 'until they shall respectively arrive at the age of thirty years.' The meaning of this provision is plain. *The trustees simply took the legal title to the trust property to the extent that it was necessary for the fulfillment of their trust duties. There is nothing in it whereby any title was passed to the beneficiaries.* An express trust to be exercised for the purpose of conveying

title to the beneficiaries would have been void (Estate of Fair, 132 Cal. 523 (84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1008); Estate of Dunphy, 147 Cal. 95 (81 Pac. 315)), and an implied trust would have been equally illegal, as what the testator could not do directly he could not do indirectly or effect by implication, so that unless the other provisions of the will give it, *it is quite apparent that none of the beneficiaries would have taken any interest in the corpus of the trust property.* Now the only language in the will which can be insisted upon as giving them any interest in the trust property is found immediately following the provision as to the payment of the *interim* income, namely, 'and as each of my said daughters and granddaughter arrives at the age of thirty years she shall have the right to demand and receive one-third of the rest and residue of my said estate as her distributive share thereof, to have and to hold the same to her and her heirs forever.' This is the only clause in the will wherein the testator attempted to make a gift of the *corpus* of the trust property to the beneficiaries, and the gift springs from the right given 'to demand and receive' one-third of the residue 'as each arrives at the age of thirty years.'" (Italics ours.)

After devoting considerable space to justify the conclusion that the words "she shall have the right to demand and receive . . . and to have and to hold the same," etc., "forever" are adequate, the opinion, at page 464, proceeds:

"Aside from these considerations addressed particularly to the devising clause of the will which, of itself, satisfies us that the devise to Ethel Pomroy was of a contingent remainder, this conclusion is

further supported by the devise over. While there is a conflict in the authorities elsewhere as to the effect of a devise over in determining whether a remainder which is not fixed by direct words of devise is contingent or vested, the matter in this state is settled.

"In the case of *In re Rogers* (94 Cal. 526), heretofore referred to, the testator had bequeathed to his grandson a legacy of ten thousand dollars to be paid in certain proportions and as he attained certain years of age; the first payment to be made when he attained fifteen, the final payment when he reached twenty-five. The clause in the will making this bequest provided further that 'if my said grandson die before arriving at the ages herein named, then the remaining or unpaid amounts of said bequests, together with the income thereon, I direct shall be distributed . . . to the brother and sisters of myself and wife . . . share and share alike'. During the administration of the estate the grandson died at the age of six or seven years and before any of the bequests were payable to him. On distribution of the estate his mother applied for payment of the legacy to her as his heir at law under the claim that the bequests to her son vested in him on the death of the testator, asserting that a bequest 'payable' or 'to be paid' to a person 'at' or 'when' he shall attain the age, etc., vests the estate immediately in him and his interest is transmissible to his representatives. The question squarely before the court in that case was whether the legacy was vested or contingent. It was held to be contingent and, in reaching that conclusion, the court took into consideration the devise over and said: 'If the last clause (the devise over) had been omitted, it might no doubt

be successfully claimed that there was a present and absolute bequest, the times of payment only being deferred, and that it vested in the legatee on the death of the testator. That clause, however, makes it clear, we think, that the intention was not to make an absolute bequest, but a conditional one to take effect only if the legatee should reach the ages named for its payment.' Hence, in this state the rule is that a devise over is to be construed as indicating an intention on the part of the testator not to make a vested devise, and applied to the devise here in question, imparts additional force to the conclusion which we think apparent from the language of the devise itself that only a contingent devise was made to Ethel Pomroy; that it was only to take effect in title and possession on the condition of her attaining the age of thirty."

Later follows language which rebuts any contention that the stipulation for payment by the Beveridge trustees of part of the income to Marian and Phyllis at and after majority is of any consequence, the court saying:

"We are mindful, too, of the rule particularly insisted upon by appellants that where the only gift is in direction to pay and deliver at a future time, or what is asserted to be the equivalent here, the 'right to demand and receive' at a future time, and the entire *interim* income is given to the beneficiary, a present gift of title to him is presumed to have been intended by the testator. Under this rule appellants insist that from the gift of the entire *interim* income to the beneficiaries here it is to be inferred that the testator intended a present gift of the *corpus* to them and that the right 'to demand and receive' as used by him only applied to the possession of the

corpus, and, therefore, the devise became vested on the death of the testator subject to become divested should any beneficiary die without issue and before obtaining possession of her share of the *corpus*. The general rule at common law is, as asserted by appellants, but without considering other objections which respondents urge against its application to this particular devise, it is at best but a rule of presumption to be indulged in only when there is no other language employed by the testator showing a contrary intention. But, as we have heretofore pointed out, the language actually used by the testator in connection with the right 'to demand and receive', and the other matters in the will to which we have called attention, defines the estate which is to be taken by the beneficiaries in the future under this right as being both title and possession. Futurity applies to both by the express language of the testator so there is no room for indulging in any presumption."

The *Blake* case and the code sections hereinabove cited are conclusive against any contention that petitioners took a vested interest subject to be divested by later events. In the instant case, not only was the gift to each petitioner expressly conditioned upon her survival, but also there was an express gift over, effective should she not survive.

Certain Misconceptions of California Law Inducing Ultimate Conclusion of Board.

Although they had before them, and quoted [Tr. p. 25] from the *Estate of Fair,* the rule that a trustee takes only such title as is required for the execution of the trust, the Board apparently concluded that the full fee title vested in the trustees, and that the petitioners took the

Hollywood lots under and through them as their successors in interest and as beneficiaries of the trust, which, as already pointed out, was not the case. This conclusion is evidenced by the following quotations from the opinion:

> "From a reading of the will it is clear that the decedent did not intend to vest in the trustees any interest except the legal title to the property, to hold in trust for the beneficiaries." [Tr. p. 26.]
>
> "Clearly the interest which the petitioners obtained upon the death of the decedent was not a remainder. Their interest under the trust was not dependent on a precedent estate." [Tr. p. 26.]
>
> ". . . we believe, from a reading of the will, that it was the intention of the decedent that her children should receive a vested interest under the trust immediately upon her death." [Tr. p. 28.]

Second. To sustain the conclusion that petitioners took a vested interest at the testator's death, the Board quotes [Tr. p. 28] section 1341, Civil Code, declaring a presumption to that effect. Such quotation is particularly inapt, immediately following, as it does, the Board's quotation [Tr. p. 27] from *Estate of Blake, supra,* concluding with this sentence:

> "It is true that presumptions are to be indulged in which will prevent intestacy (Le Breton v. Cook, 107 Cal. 410, 40 Pac. 552), and that testamentary devises are presumed to vest at the death of the testator (Civ. Code, sec. 1341); but these presumptions, like the auxiliary rules of construction relied on by appellant, are subordinate to the cardinal rule just stated."

The "cardinal rule just stated" was that in absence of "ambiguity, the language used must be interpreted according to its ordinary meaning and legal import, and the intention of the testator ascertained thereby."

In the *Estate of Blake*, as already appears, the court decided that the future interest did *not* vest on the death of the testator, that its vesting was contingent and conditional and that it never did vest in Ethel Soule, the person initially first in rank as a final taker.

There was no trace of uncertainty or ambiguity in the will of Mrs. Beveridge. She directs what the trustees are to take and what and when and under what conditions the other devisees are to take—all in language so clear that no rules of construction or presumptions are required to ascertain her intent.

Third. The Board [Tr. p. 28] also stresses, to augment the statutory presumption, subdivision VI of the will [Tr. p. 20], providing, in effect, that should the trust be adjudged void, the children of the testator are to take the entire estate.

It is too plain to require argument that the primary and paramount desire of Mrs. Beveridge was to make effective (a) her devise to the trustees benefiting three persons in addition to her children, and (b) her devise to those who on the termination of the trust could qualify as final takers but who might not be her children.

Clause VI merely evidences a secondary scheme effective only if the execution of her primary desire should be frustrated by an adverse adjudication, a desire that her children should then take all, to the end that intestacy

would be avoided and Husband Beveridge should take no part of her estate as an heir.

Fourth. At transcript, page 30, the opinion of the Board states the decree of distribution required the *trustees* to deliver the estate to the beneficiaries. This statement is in error, since it appears from the findings [Tr. p. 22] that the decree was undoubtedly rendered on the first and final account report and petition for distribution filed by the *executrix*.

That California law governs is clearly established.

> "It is a principle firmly established that to the law of the State in which the land is situated we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances. United States v. Crosby, 11 U. S. 7 Cranch, 115 (3: 287); Clark v. Graham, 19 U. S. 6 Wheat. 577 (5: 334); McGoon v. Scales, 76 U. S. 9 Wall, 23 (19: 545); Brine v. Hartford F. Ins. Co., 96 U. S. 627 (24:858)."
>
> *De Vaughn v. Hutchinson,* 165 U. S. 566.

See also:

Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 399;

Crooks v. Harrelson, 282 U. S. 55, 62;

Poe v. Seaborn, 282 U. S. 101, 110.

SECOND GENERAL POINT OF LAW.

Income Tax Law.

BREWSTER V. GAGE DISTINGUISHED.

The Board, laboring as it did under a misapprehension of the California law, based its ultimate conclusion on *Brewster v. Gage,* 280 U. S. 327; 74 L. Ed. 457, which involved the time of "acquisition" of personal property passing under a residuary bequest to a legatee in New York, where, under the common law rule, the executor takes legal title to the personalty. The facts in that case may be distinguished quickly from those in the instant case.

The executor there took and held, during the interim, legal title for the purposes of administration and as trustee for the legatee. Upon the death of the testator, the equitable title at once vested in the legatee who ultimately took legal title under and through a transfer from the trustee, made in the performance of the trustee's trust obligations as trustee for the legatee. The trust was one to administer and transfer to the legatee legal title in what remained. The bequest was unconditional and the rights of the legatee vested instantly. There were no conditions precedent to be complied with by the legatee to make the bequest effective. The vested beneficial interest of the legatee was upon the death of the testator instantly subject to alienation and would pass to his heirs or executors. *Not one of these elements was present in our case.*

Petitioners Acquired Property in 1923.

The Act provides that, in determining gain or loss resulting from sale of *property* "acquired" by devise, the basis shall be the fair market value "at the time of such acquisition".

Since until 1923 the appellants had no interest in the realty in question, there was nothing to which a market value could be ascribed in 1914.

What each petitioner took in 1914 was a mere expectancy, a right of no higher rank than that of a California wife in the community property prior to the amendments of 1921, which the decisions of the California courts have consistently held to be a "mere expectancy" and which decisions the United States Supreme Court followed in determining that the California husband and wife might not divide the community income in separate tax returns. In the wife's case, as well as in our case, there was more than a mere hope, but, nevertheless, there was not an interest which could reasonably be considered as even approaching property ownership.

Nor were petitioners' rights in the expectancy exclusive, as was true in the case of a California wife, since here each of the various other possible final takers had an expectancy—an expectancy in each similar to that enjoyed by each of the others, including petitioners, identical in every aspect, save for the varying degrees of rank. However, the preferred rank of any holder in nowise rendered the essential quality or nature of his expectancy different to the quality or nature of the expectancy held by each other possible taker.

Under the Commissioner's theory, if both petitioners had died one day prior to the 25th birthday of daughter Phyllis, then the final takers, whoever they might be and whether or not even born in 1914, would have acquired the realty in 1914—a result which refutes the theory of an acquisition in 1914 by petitioners. One fallacy of this theory is that it looks to conditions in 1923 to determine who acquired the realty in 1914. Certainly, if the appellants "acquired" the realty in 1914, no one else could have done so. Yet, if events had been different, entirely different people would now be charged with having acquired the same land in 1914.

The revenue acts deal with substantial, vested property interests, not with contingent and conditional expectancies.

In *Brewster v. Gage* it could fairly be said that the legatees had substantially acquired the property at decedent's death. Likewise, in the other tax decisions cited in the Board's opinion, there were immediately vested interests in the property which were presently marketable, subject only to postponement of possession. Such other cases represented an extension of the principle laid down by the Supreme Court and are subject to doubt. See, for example, the dissenting opinions in *William Huggett,* 24 B. T. A. 669, now pending on appeal before the Court of Appeals for the District of Columbia. Nevertheless, in each of these cases, the taxpayer received a substantial vested interest in the property immediately upon decedent's demise.

Furthermore, the Treasury Department had consistently ruled in cases involving contingent remainders that the

basis of the property was the fair market value of such rights *at the time they vested.*

In Solicitor's Opinion 35, 3 Cum. Bull. 50 (1920), the position of the Department in respect to vested remainders was stated as follows:

> "The only difference between the subject matter disposed of by sale in behalf of the children after the death of the life tenant and that acquired by them on the death of testator is that the former carried with it the actual possession of the property and the latter did not. Notwithstanding this fact, however, the right to the possession *vested* in the children at the death of the testator; the enjoyment alone was postponed to the death of the life tenant. *Likewise, all the rights which the children acquired with respect to the land vested at the death of the testator and were as perfect then as at the death of the life tenant. Scofield et al. v. Olcott et al.* (Ill.), 11 N. E. 351, 352; *Nichols v. Levy,* 5 Wall. 433, 442-3. It is believed, therefore, that the remainder acquired by the children on the death of the testator is essentially the same property as the fee simple sold in their behalf after the death of the life tenant."

(The italics in the above and following quotations have been supplied by us.)

See also Income Tax (Ruling) 1622, II—1 C. B. 135 (1923) to the same effect.

Since the Supreme Court had held in *Brewster v. Gage* that the Department's continuous interpretation of this provision of the law in respect to unconditional bequests, followed as it was by subsequent re-enactments

without change, was to be given considerable weight, it is not surprising that the Board and the courts have followed these rulings. Certainly, in the present case, we have no quarrel to make with these rulings or decisions, since they involve presently vested estates and interests in the title to property.

We have yet to find, however, a decision by the Board or of a court, holding that a contingent remainder or other expectancy is an interest of such substance that it may be treated as ownership or "acquisition" of property. Furthermore, we have been unable to find a single ruling by the Treasury Department which has so interpreted the revenue acts. On the contrary, it has consistently and continuously taken the contrary position.

In Office Decision 727, 3 Cum. Bull. 53 (December, 1920), the Department made an express ruling on the question as follows:

> "Section 202, Article 1562: Sale of property acquired by gift or bequest.
>
> "Where in a bequest of property the remaindermen have only a *contingent interest* prior to the death of the life tenant, *the basis* for determining gain or loss from a sale of such property by the remaindermen *is its value as of the death of the life tenant.*"

Again, in Solicitor's Memorandum 4640, V—1 C. B. 60 (January, 1926), held that "a person having only a contingent interest in property sustains no deductible loss by reason of destruction of the property by fire", drawing a sharp distinction between "vested" and "contingent" remainders.

In a very recent ruling by the General Counsel, G. C. M. 10260, XI—1 C. B. 79 (March, 1932), a similar question was presented. The will of a testator who died in 1880, left certain property in trust to her daughter "A" during her natural life; and in trust further if the daughter should die leaving lawful issue, to said issue share and share alike, until the youngest should reach the age of 21; but if the daughter should die leaving no lawful issue living, or if said issue should all die before the youngest should reach the age of 21, then the property should go into the residuary estate. "A" died in 1926, leaving seven children living, all of whom had then attained the age of 21 years, and the property was delivered to them. In determining the basis of the property to said issue, the General Counsel said in part (p. 80):

> "The first question is whether the children of A (the grandchildren of the testatrix) 'acquired' the property before March 1, 1913. It is concluded that the answer is in the negative, and for two reasons: First, there is no evidence that all of the grandchildren were in being prior to that date, and any person not yet in being obviously could not acquire property; in the second place, their interests were wholly contingent under the law of Pennsylvania until the death of their mother in 1926 (*In re Adams' Estate,* 208 Pa. 500, 57 Atl. 979; *In re Alburger's Estate,* 274 Pa. 15, 117 Atl. 452); and *the position of this office has been that one who has a mere contingent interest does not 'acquire' the property in question until his interest becomes vested.* (O. D. 727, C. B. 3, 53; S. M. 4640, C. B. V—1, 60.) (See also I. T. 1622, C. B. II—1, 135; S. O. 35, C. B. 3, 50.)"

It will be noted that the interests there in question were contingent remainders under the applicable state law; and further that the General Counsel cites with approval rulings dating back to 1920 as showing the consistent interpretation of the Treasury Department to the effect that the owner of a contingent interest does not "acquire" the property, within the meaning of the Revenue Acts, *until his interest becomes vested.*

Again, at page 96, the General Counsel said:

> *"Contingent beneficiaries or remaindermen are not regarded as having 'acquired' property under the Revenue Acts,* and, consequently, in such cases 'distribution' as well as acquisition, is necessarily contingent until substantial ownership vests, at which time distribution to them is automatically concluded."

The Treasury Department having consistently ruled under all the revenue acts that a contingent remainderman does not "acquire" the property until his interest becomes *vested,* we do not believe the action of the Department in the present cases represents an intended departure from this interpretation of the revenue law, but that it arises solely from a misconception of the California law and a failure to thoroughly and properly analyze the will of Mrs. Beveridge. In other words, we believe that the Department has heretofore labored under the same errors which are manifested throughout the decision of the Board.

Even in absence of such rulings by the Department, we are unable to conceive any principle of law or reason which may be successfully advanced to sustain a conclusion that petitioners *acquired* the Hollywood lots in

1914 under the devise of the reversionary estate in property, the fee to which had passed to the trustees upon a condition subsequent—a devise never effective until the performance of the prescribed conditions precedent—a devise under which no estate or title to property was *acquired* by any one until 1923—a devise under which petitioners along with many others, enjoyed during the interim, a mere expectancy of possible *future acquisition*—a devise under which petitioners might have *acquired* nothing—a devise under which petitioners did in 1923 *acquire* certain realty, the *acquisition* and *sale* of which gave rise to the instant cases.

We, therefore, submit that since the Board expressly found no increment in value between July 25, 1923 and the respective dates of sales, the deficiencies in question were erroneously asserted.

Respectfully submitted,

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Nos. 6994 and 6995

In the United States Circuit Court of Appeals for the Ninth Circuit

MARIAN B. PRINGLE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

PHYLLIS B. BRUNSON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

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Assistant Attorney General.
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CITATIONS

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ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

OPINION BELOW

The only previous opinion in these cases is that of the United States Board of Tax Appeals (R. 23–32), which is reported in 26 B. T. A. 362.

JURISDICTION

These cases involve taxes for the year 1923 in the total amount of $6,487.70. (R. 15, 32.)[1] The de-

[1] The deficiency in each case is $3,243.85. (R. 15.)

cision of the Board of Tax Appeals was entered June 10, 1932. (R. 32.) Petitions for review were filed September 7, 1932 (R. 42),[2] pursuant to Sections 1001–1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109–110 (U. S. C. Supp. VI, Secs. 641–642).

QUESTION PRESENTED

When did the petitioners *acquire* the property which they sold during July and August, 1923?

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1921, c. 136, 42 Stat. 227:

> SEC. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—
>
> * * * * *
>
> (3) In the case of such property, acquired by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition. The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in subdivision (c) or (e) of section 402.
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> * * * * *

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[2] The cases were consolidated for hearing before the Board (R. 15) and but one finding of fact and one opinion entered (R. 48). The same question is involved in both cases, and therefore by stipulation (R. 47) both cases are to be presented upon the record in No. 6994.

Treasury Department Regulations 62 (1922 Edition):

> ART. 1563. *Sale of property acquired by gift on or before December 31, 1920, or by bequest, devise, or inheritance.*—In computing the gain or loss from the sale or other disposition of property acquired by gift on or before December 31, 1920, or by request, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of acquisition. * * *. In the case of property acquired by bequest, devise, or inheritance, its value as appraised for the purpose of the Federal estate tax or in the case of estates not subject to that tax its value as appraised in the State court for the purpose of State inheritance taxes shall be deemed to be its fair market value when acquired.

STATEMENT

Ida Wilcox Beveridge died August 7, 1914 (R. 16), leaving surviving: Philo J. Beveridge, husband (R. 16); Marian Beveridge (now Marian Pringle, one of the petitioners) and Phyllis Beveridge (now Phyllis Brunson, one of the petitioners), daughters (R. 17); Amelia J. Hartwell, mother (R. 22); and Madge H. Connell, sister (R. 16). By the terms of her will she left certain real estate situated in California in trust for a period of twenty-five years from the birth of her younger daughter Phyllis, providing, however, that the trust

should terminate should both of her daughters die before that date. (R. 18.) The will provided that upon the expiration of the trust the property "shall descend to and be distributed among such of my children as shall be living at the expiration of such trust, share and share alike" but that should either daughter be dead at the end of the trust period leaving issue, such issue should take the share of the parent; should one die without issue, then the whole would go to the survivor; should both die before the end of the trust period leaving no issue, title would vest in her husband and sister, share and share alike, should they be living at that time. Provision was made against the event either husband or sister, or both, should be dead. (R. 18–19, 22.)

Phyllis Beveridge Brunson reached the age of 25 years on July 25, 1923, and on July 26, 1923, the real estate here in question was distributed to the two daughters as tenants in common, share and share alike. (R. 22.)

Between July 29 and August 1, 1923, the real estate in question was sold by petitioners for $276,222.76. The fair market value of such property on July 26, 1923, was the same as the selling price. However, its fair market value as of the date of the death of petitioners' mother was $76,600. (R. 23.)

In determining the profit accruing from the transaction the Commissioner of Internal Revenue took as the base $76,600, the value of the property as of the date of the death of petitioners' mother

(R. 12, 23), and determined deficiencies accordingly (R. 11–12, 23).

Appeals were taken to the Board of Tax Appeals, where it was contended that the basis for determining gain or loss should have been the value of the property on July 25, 1923, the date Phyllis B. Brunson, became twenty-five years of age. (R. 3–8, 24.)

The Board of Tax Appeals rejected petitioner's contention and sustained the deficiencies. (R. 23–32.) Petitioners bring the question thus presented to this Court for review.

SUMMARY OF ARGUMENT

Section 202 (a) (3) of the Revenue Act of 1921 (*supra,* p. 2), as construed by the officers in charge of its administration, fixes the basis for determining the gain derived or loss sustained upon the sale of property received by devise, bequest, or inheritance as " its value as appraised for the purpose of the Federal estate tax ", i. e., its value at the date of decedent's death. By subsequent reenactments of the statute the administrative interpretation has received the implied approval of Congress. As so construed, the statute is valid when applied to petitioners, even though they received but a contingent estate upon the death of their mother. See *Taft* v. *Bowers,* 278 U. S. 470; *Osburn California Corporation* v. *Welch,* 39 F. (2d) 41 (C. C. A. 9th).

ARGUMENT

The basis for determining gain derived or loss sustained upon the sale of property acquired by devise is its value as established for estate tax purposes, i. e., its value at the date of the death of the decedent

Section 202 (a) of the Revenue Act of 1921 (*supra*, p. 2) fixes the basis for determining gain derived or loss sustained upon the sale or disposition of property acquired after February 28, 1913, as being the cost, except that—

> (3) In the case of such property, acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition.

Petitioners contend that their acquisition of the real estate involved was made contingent upon their being alive at the termination of the trust period, and therefore that the property was not acquired by them until July 25, 1923, when that contingency occurred. From this premise they argue that the basis for determining gain or loss was the value of the real estate on July 25, 1923, and not on August 7, 1914, as determined by the Commissioner. It is submitted that even though the premise were sound the conclusion is not warranted.

Article 1563 of Treasury Regulations 62 (*supra*, p. 3), promulgated under the above section, provides that in computing the gain derived or loss sustained from the sale or other disposition of property acquired by bequest, devise, or inherit-

ance, the basis shall be " its value as appraised for the purpose of the Federal estate tax or in the case of estates not subject to that tax is value as appraised in the State court for the purpose of State inheritance taxes." Article 1562 of Treasury Regulations 45, promulgated under the Revenue Act of 1918 (c. 18, 40 Stat. 1057), was the same, and an identical provision was carried forward into Article 1594 of Treasury Regulations 65, promulgated under the Revenue Act of 1924 (c. 234, 43 Stat. 253), and Article 1594 of Treasury Regulations 69, promulgated under the Revenue Act of 1926 (c. 27, 44 Stat. 9).

Section 202 (a) (3) was new in the Revenue Act of 1921. It was carried forward into Section 204 (a) (5) of the Revenue Acts of 1924 and 1926. When H. R. 1, which later became the Revenue Act of 1928 (c. 852, 45 Stat. 791) passed the House it contained a similar provision. However, when it reached the Senate it was amended. So far as here material the section as so amended and as it finally was enacted into law provided (Sec. 113 (a) (5)):

> If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent.

See the Senate Print, H. R. 1, 70th Congress, 1st Session, p. 82 (dated May 3, 1928). The report of

the Committee on Finance (S. Rep. No. 960, 70th Cong., 1st Sess., p. 26) discloses that the Senate had no thought of changing the law so far as it applied to a situation such as that here involved.[3] With relation thereto it said:

> The House bill in section 113 (a) (5) provides that in such cases the basis shall be the fair market value of the property *at the time of the death of the decedent. In the same section the House bill provides the same basis shall be used where the property is sold by the beneficiary.*
>
> * * * * *
>
> Accordingly, the committee has revised section 113 (a) (5) and certain related sec-

[3] So far as it pertained to section 113 (a) (5), the full Committee Report is as follows:

"The decision by the Court of Claims in *McKinney* v. *United States* has caused confusion in the existing law as to the basis on which an executor must determine gain or loss on the sale by him of property of the estate. The House bill in section 113 (a) (5) provides that in such cases the basis shall be the fair market value of the property at the time of the death of the decedent. In the same section the House bill provides the same basis shall be used where the property is sold by the beneficiary.

"It appears that the House bill is inadequate to take care of a number of situations which frequently arise. For example, the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property. Moreover, the fair market value of the property at the decedent's

tions, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, *the basis shall be the fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary.* (Italics supplied.)

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death can not properly be used as the basis, in the case of property transferred in contemplation of death where the donee sells the property while the donor is living.

"Accordingly, the committee has revised section 113 (a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary."

From a full reading of this report as set forth in footnote (3) it will be observed that the revision of Section 113 (a) (5) related to other phases of the section. So far as material here the two extracts from the Committee Report set out above make it plain that the Senate did not intend to change the existing law. It is therefore submitted that if there is any logic in the contention that the word "acquisition" applies literally to the time when title actually vests, such "logic must yield to history" (*Schuette* v. *Bowers,* 40 F. (2d) 208, 213 (C. C. A. 2d), and history makes it perfectly clear that not only has Congress, by the reenactment of the statutory provisions of Section 202 (a) (3) of the Revenue Act of 1921 in Section 204 (a) (5) of the Revenue Acts of 1924 and 1926, impliedly approved the administrative interpretation of the statute (*Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378; *Poe* v. *Seaborn,* 282 U. S. 101, 116; *The Massachusetts Mutual Life Insurance Co.* v. *United States,* No. 322, S. Ct., October Term, 1932, decided February 6, 1933, not officially reported but found in Vol. 1, Prentice-Hall Fed. Tax Service (1933), p. 779), but the Senate Committee on Finance in drafting Section 113 (a) (5) of the 1928 Act interpreted the House draft of the Bill which continued the former provision of the statute as fixing the basis where property is sold by a beneficiary as the value of the property at the date of

the decedent's death, thus accepting the administrative interpretation of the statute. It is therefore submitted that it was the intent of Congress that one receiving real property by devise should take as his base the value of the property at the date of the decedent's death, thus providing that the devisee should pick up the property where the decedent laid it down. See *Brewster* v. *Gage*, 280 U. S. 327.

In treating all real estate acquired by devise as having been acquired at the date of the decedent's death, Congress and the administrative officers have done nothing more than treat all the several parts and ceremonies necessary to complete the transfer of title as one act, operating from the date of the first substantial part by relation. That this may be done is firmly established (*United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 334–335), and it has often been resorted to in the application of taxing statutes (see *Brewster* v. *Gage*, 280 U. S. 327, 334; *Schuette* v. *Bowers*, 40 F. (2d) 208, 213 (C. C. A. 2d); *People ex rel. Gould* v. *Barker*, 150 N. Y. 52, 57–59; *Smith* v. *Northampton Bank*, 4 Cushing (58 Mass.) 1, 12; *Commonwealth* v. *Bingham's Admr.*, 188 Ky. 616, 619–620), and such doctrine of relation applies with particular force to a situation like the one here involved (*Chandler* v. *Field*, 58 F. (2d) 370 (N. H.)), affirmed (C. C. A.

1st) January 3, 1933, not officially reported but found in Vol. 1, Prentice-Hall Fed. Tax Service (1933), p. 654.

Concededly the direct source of petitioners' title was the will of their mother (see their brief, pp. 19–20), and that will provided that the property should "descend to and be distributed among" petitioners (R. 18). If that provision of the will was valid, and its validity is essential to petitioners' contention that they received but a contingent estate (Br. 19–20), it follows that by the very terms of the will petitioners' acquisition of the property related back to and came directly from their mother. It follows that even though petitioners' received but a contingent remainder their acquisition thereof related back to the mother's death.

In any event, it was clearly within the power of Congress to provide that one receiving property by devise, bequest, or inheritance should take as his base the value of the property at the death of the decedent (see *Taft* v. *Bowers,* 278 U. S. 470; *United States* v. *Phellis,* 257 U. S. 156, 171; *Osburn California Corporation* v. *Welch,* 39 F. (2d) 41 (C. C. A. 9th), and, as appears above, it is our contention that it did so. Such a construction of the statute makes for uniformity, reaches the substance rather than the form (cf. *Chandler* v. *Field, supra*), and gives effect to the manifest intent of Congress.

CONCLUSION

It is therefore submitted that the decision of the Board of Tax Appeals should be affirmed.

Respectfully,

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U. S. GOVERNMENT PRINTING OFFICE: 1933

No. 6997

United States
Circuit Court of Appeals
For the Ninth Circuit.

FALON E. KIRK,

Claimant and Appellant,

vs.

UNITED STATES OF AMERICA,

Libelant and Appellee,

AMERICAN GAS SCREW V-293, her motors, tackle, apparel, furniture, etc., and ERIC HOGSTROM,

Respondents.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

FALON E. KIRK,

Claimant and Appellant,

vs.

UNITED STATES OF AMERICA,

Libelant and Appellee,

AMERICAN GAS SCREW V-293, her motors, tackle, apparel, furniture, etc., and ERIC HOGSTROM,

Respondents.

Transcript of Record.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

INDEX TO EXHIBITS.

Names and Addresses of Proctors.

For Claimant and Appellant F. E. Kirk:

H. WM. HESS, Esq.,
Civic Center Building,
Los Angeles, California.

STANLEY M. DOYLE, Esq.,
Glendive, Dawson County, Montana.

For Libelant and Appellee:

SAMUEL W. McNABB, Esq.,
United States Attorney;
FRANK M. CHICHESTER, Esq.,
Assistant United States Attorney;
LOUIS J. SOMERS, Esq.,
Assistant United States Attorney,
Federal Building,
Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Libelant, vs.	)	No. 5406-H
AMERICAN GAS SCREW V-293, her motors, tackle, apparel, furniture, etc., Respondent.	)	LIBEL OF INFORMATION

TO THE HONORABLE JUDGES OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA:

The United States of America, by Samuel W. McNabb, United States Attorney for the Southern District of California, and Frank M. Chichester, Assistant United States Attorney for said District, brings suit herein in a cause of forfeiture civil and maritime against the American Gas Screw V-293, her motors, tackle, apparel, furniture, etc., and against all persons intervening for their interest therein, and alleges as follows:

I.

That the Respondent, American Gas Screw V-293, was seized by the United States Coast Guard, Section Base No. 17, while standing to sea from San Pedro Harbor in the vicinity of Point Firmin on March 3, 1932, for violation of the laws of the United States, and that said vessel on the date of the filing of this Libel is in the custody of the United States Coast Guard, Section Base No.

17, in the Harbor of Los Angeles, California, and within the jurisdiction of this Honorable Court;

That the said seizure has been adopted by the Collector of Customs for the Port of Los Angeles, California, District No. 27.

II.

That the appraised value of the said American Gas Screw V-293, her motors, tackle, apparel, furniture, etc., is Four Thousand Dollars ($4,000.00).

III.

That the said American Gas Screw V-293 was documented in the name of F. E. Kirk for the purpose of fishing and was given the No. V-293 by the Collector of Customs for District No. 27, and that said vessel is of a net tonnage of less than five (5) tons.

IV.

That on or about March 3, 1932, the said American Gas Screw V-293 engaged in a trade other than that for which she was licensed in violation of Section 4377 R. S., 46 U. S. C. A. 325.

V.

That because of the violation of the aforesaid Section 4377 R. S., 46 U. S. C. A. 325, the Respondent, American Gas Screw V-293, together with her motors, tackle, apparel, furniture, etc., has become forfeit to the United States of America.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, on behalf of the United States of America, Samuel W. McNabb, United States Attorney for the Southern District of California, and Frank M.

Chichester, Assistant United States Attorney for said District, pray the usual process and monition of this Honorable Court to issue against the said American Gas Screw V-293, her motors, tackle, apparel, furniture, etc.; that all persons concerned or interested in the said vessel, her motors, tackle, apparel, furniture, etc., may be cited to appear and show cause why a forfeiture of the same should not be decreed; and that all due proceedings being had thereon, this Honorable Court may be pleased to decree for the forfeiture aforesaid; that the said American Gas Screw V-293, her motors, tackle, apparel, furniture, etc., may be condemned, as aforesaid, according to the statutes and the Acts of Congress in that behalf provided.

Samuel W. McNabb
SAMUEL W. McNABB,
United States Attorney,

Frank M. Chichester
FRANK M. CHICHESTER,
Assistant United States Attorney,
Attorneys for Libelant.

[Endorsed]: Filed Mar. 11, 1932. R. S. Zimmerman, Clerk, by C. A. Simmons, Deputy Clerk.

UNITED STATES OF AMERICA)
) ss (SEAL)
Southern District of CALIFORNIA) No. 5406-H

THE PRESIDENT OF THE UNITED STATES OF AMERICA, To the Marshal of the United States, for the Southern District of California, Greeting:

WHEREAS, a libel in rem hath been filed in the District Court of the United States for the Southern

District of California, on the 11th day of March, in the year of our Lord one thousand nine hundred and thirty-two, by the United States of America, Libellant, vs AMERICAN GAS SCREW V-293, her motors, tackle, apparel, furniture, etc., by Samuel W. McNabb, United States Attorney for the Southern District of California, in a cause of condemnation, seizure and sale, for the reasons and causes in the said Libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said AMERICAN GAS SCREW V-293, her motors, etc., may be cited in general and special to answer the premises and all proceedings being had that the said AMERICAN GAS SCREW V-293, her motors, tackle, apparel, furnityre, etc., may for the causes in the said Libel mentioned, be seized, condemned and forfeited to satisfy the demands of the Libellant.

YOU ARE THEREFORE HEREBY COMMANDED to attach the said AMERICAN GAS SCREW V-293, etc. and to detain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear before the said Court, to be held in and for the Southern District of California, Central Division, at the Courtroom of the Honorable Harry A. Hollzer, Judge of the said United States District Court, in the Federal Building, in the City of Los Angeles, State of California, on the 4th day of April, A. D. 1932, at 10 o'clock in the forenoon of the same day, if that day

shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations on that behalf. And what you shall have done in the premises do you then and there make return thereof, together with this writ.

WITNESS, the Honorable WM. P. JAMES, Judge of said Court, at the City of Los Angeles, in the Southern District of California, this 11th day of March, in the year of our Lord one thousand nine hundred and thirty-two, and of our Independence the one hundred and fifty-sixth.

R. S. ZIMMERMAN, Clerk
C. A. Simmons, Deputy Clerk

Samuel W. McNABB, United States Attorney,
Frank M. Chichester, Asst. U. S. Attorney,
Proctor for Libellant

In obedience to the within monition, I attached the American Gas Screw V 293 therein described, on the 16th day of March, 1932 and have given due notice to all persons claiming the same, that this Court will, on the 4th day of April, 1932 (if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claim be interposed for the same.

Dated March 16, 1932

A. C. Sittel, U. S. Marshal
By ....., Deputy

[Endorsed]: Filed Mar 17 1932 R. S. Zimmerman, Clerk By Theodore Hocke, Deputy Clerk

[Title of Court and Cause.]

In Admiralty Stipulation for costs.

WHEREAS, a libel has been filed in this Court by the United States of America against the said respondent for the reasons and causes in the said libel mentioned, and FALON E. KIRK, the owner of said AMERICAN GAS SCREW V-293, et-cetera, above named, and THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation organized, created and existing under and by virtue of the laws of the State of New York, with its principal office at 80 Maiden Lane, New York City, and duly authorized to and doing business in the State of California, and within this district, surety for the respondent, hereby consenting that in case of default of the case on the part of the respondent, execution for the sum of Two Hundred fifty Dollars ($250.00), may issue against the parties hereto, their goods, chattels and lands.

NOW Therefore, it is hereby stipulated and agreed for the benefit of whom it may concern, that the stipulators undersigned are hereby bound in the sum of Two Hundred Fifty Dollars ($250.00), conditioned that the respondent above named and said stipulators shall pay all costs and expenses which shall be awarded against them or either of them, by the final decree of this Court or upon an appeal by the Appellate Court.

Dated at Los Angeles, California, this 2nd day of April, 1932

Falon E. Kirk
Respondent

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK

[Seal] By William J. Bennett, Attorney

Acknowledged.

[Endorsed]: Filed Apr 4 1932 R. S. Zimmerman, Clerk By C. A. Simmons, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

In Admiralty Stipulation for costs.

WHEREAS, a libel has been filed in this Court by the United States of America against the said respondent for the reasons and causes in the said libel mentioned, and Eric Hogstrom, the Master and Charterer of said AMERICAN GAS SCREW V-293, et-cetera, above named, and THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation organized, created and existing under and by virtue of the laws of the State of New York, with its principal office at 80 Maiden Lane, New York City, and duly authorized to and doing business in the State of California, and within this district, surety for the respondent, hereby consenting that in case of default of the case on the part of the respondent, execution for the sum of Two Hundred fifty and no/100 Dollars ($250.00), may issue against the parties hereto, their goods, chattels and lands.

NOW Therefore, it is hereby stipulated and agreed for the benefit of whom it may concern, that the stipulators undersigned are hereby bound in the sum of Two Hundred Fifty and no/100 Dollars ($250.00), conditioned that the respondent above named and said stipulators shall pay all costs and expenses which shall be awarded against them or either of them, by the final decree of this Court or upon an appeal by the Appellate Court.

Dated at Los Angeles, California, this 4th day of April, 1932

.....

Respondent

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK

[Seal] By William J. Bennett, Attorney

Acknowledged.

[Endorsed]: Filed Apr 4 1932 R. S. Zimmerman, Clerk By C. A. Simmons, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

INTERVENOR'S PETITION AND ANSWER TO LIBEL

Comes now F. E. KIRK, an American Citizen, of Arcadia, California, owner and claimant of the American Gas Screw fishing and general utility boat, V-293 (undocumented under 5 tons) of San Diego, California, as described and mentioned in the afore-mentioned libel, her tools, apparel, engines and equipment as the same are *preceded* against in the libel of the United States of America, the libelant in the above mentioned cause, and answering said libel and complaint, alleges as follows:

I.

Claimant and intervenor admits all the allegations contained in Paragraphs I and II of said libel.

II.

Answering Paragraph III claimant and intervenor admits that the said boat was documented for the principal purpose of fishing under customs catalogues No. 1511 and 1512 and admits that said vessel is of a net tonnage of less than five tons.

III.

Answering Paragraph IV of said libel claimant and intervenor denies each and every allegation contained in said paragraph IV and denies that at the time said vessel was so seized that it was being operated for any other purpose than the lawful purpose for which she was documented, and denies that said vessel has at any time or at all been operated in violation of any law, rule and regulation of the Government of the United States.

IV.

Claimant and intervenor denies each and every allegation contained in said Paragraph V and denies that on the date said vessel was so seized that it had become or has become forfeited to the United States of America for the violation of any law, rule or regulation of the United States Gove*rn*ment as set forth in said libel or for any other purpose or at all.

FURTHER ANSWERING SAID LIBEL AND AS AN AFFIRMATIVE DEFENSE, CLAIMANT AND INTERVENOR ALLEGES:

I.

That he is the owner of said vessel and at the time that the vessel was so seized as hereinbefore set forth, was being operated by one Eric Hogstrom under charter from this claimant. That said vessel was so chartered to said Hogstr*u*m for the purposes for which said vessel was documented, to-wit, fishing and general utility purposes, the principal occupation being designated as fishing therein. That this claimant and intervenor is entitled to the possession of said vessel as the sole owner thereof subject only to the charter party agreement entered into with the said Eric Hogstrom as aforesaid.

WHEREFORE, claimant and intervenor prays that the libelant have and take nothing by this action; that the said vessel mentioned and described herein and in said libel be returned to this claimant and intervenor and that said claimant and intervenor be adjudged to be the sole and exclusive owner of said vessel and entitled to the possession of the same, subject only to the claims of the said Hogstrom under his charter party agreement and

this claimant and intervenor have such other and further relief as to the court may seem meet and just and equitable and recover his costs herein.

John B. Yakey
Attorney for claimant and intervenor

Verified.

[Endorsed]: Filed Apr. 4, 1932. R. S. Zimmerman, Clerk, by C. A. Simmons, Deputy Clerk.

[Title of Court and Cause.]

CLAIM OF F. E. KIRK

Comes now F. E. Kirk, an American Citizens of Arcadia, California, and says that he is the owner of the American Gas Screw fishing and general utility boat, V-293 (undocumented under 5 tons) of San Diego, California, as described and mentioned in the afore mentioned libel, her tools, apparel, furniture, engines and equipment, and intervening for his interest in the said property, appears before this honorable court and claims the said property, and states he is the true and sole owner thereof and that no other person or persons are the owners or interested therein other than Eric Hogstrom, an American Citizen of San Pedro, California, who has said vessel under charter for a period of six months from the 1st day of November, 1931.

That he acquired said property by having same constructed for his account on July 29, 1931 and that this claimant has been the sole owner thereof continuously from said date of construction.

WHEREFORE, said claimant prays that this honorable court will be pleased to decree the restitution of the

aforesaid property, subject to said charter party contract and for such other relief as to the court may deem just and proper.

F. E. Kirk
Claimant

John B. Yakey
Attorney for Claimant

Verified.

[Endorsed]: Filed Apr. 4, 1932. R. S. Zimmerman, Clerk, by C. A. Simmons, Deputy Clerk.

[Title of Court and Cause.]

CLAIM OF ERIC HOGSTROM.

Comes now Eric Hogstrom, an American Citizen of San Pedro, California, and says that he is the charterer of American Gas Screw fishing and general utility boat, V-293 (undocumented under 5 tons) of San Diego, California, as described and mentioned in the afore-mentioned libel, her tools, apparel, furniture, engines and equipment, having chartered the same from F. E. Kirk, the owner thereof, on or about the 1st day of November, 1931, for a period of six months from the date thereof, and was operating said boat on March 3rd, 1932, on which date the vessel was seized by an officer of the United States Government for an alleged violation of Section 4377 R. S. 46 U. S. C. A. 325, in waters directly outside of San Pedro Harbor, bound for Santa Cruz Island.

That this claimant at the time said boat was so seized was the sole operator of said boat under said charter and no other person had any interest in said boat other than the said F. E. Kirk, from whom the same was char-

tered. That at the time said boat was so seized as aforesaid the same was being operated by this claimant in a lawful manner and in compliance with the laws, rules and regulations of the United States Government.

WHEREFORE, this claimant prays that this honorable court will be pleased to decree the restitution of the aforesaid property to this claimant subject to the rights of the said F. E. Kirk, owner thereof, and for such other relief as the court may deem just and proper.

Eric Hogstrom
Claimant

John B. Yakey
Attorney for claimant

Verified.

[Endorsed]: Filed Apr. 4, 1932. R. S. Zimmerman, Clerk by C. A. Simmons, Deputy Clerk

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District Court of the United States of America
Southern District of California

UNITED STATES OF AMERICA,	)	
vs.	)	No. 5406-H.
AMERICAN GAS SCREW V-293, her motors, tackle, apparel, furniture, etc.	)	

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To BUCK McGOWAN, 2719 Hollyridge, Hollywood, California, or West Basin Marine Charters, West Basin Yacht Anchorage, Wilmington, California, GREETING:

You are hereby required, that all and singular business and excuses being set aside, you appear and attend before the Honorable Harry A. Hollzer, Judge of the District Court of the United States for the Southern District of California, Central Division, to be held at the Court Room of said Court, in the City of Los Angeles, on the 28th day of April, A. D. 1932, at 10 o'clock A. M., then and there to testify in the above-entitled cause, now pending in said Court, on the part of the above-named plaintiff, and bring with you your checks, numbers 242, 257, 162 issued to Eric Hogstrom, and any others issued for the use of V-293. And for a failure to attend, as above required, you will be deemed guilty of contempt of Court and liable to pay to the party aggrieved all loss and damage sustained thereby.

WITNESS, The Hon. Harry A. Hollzer, Judge of the District Court of the United States for the Southern District of California, and the seal of the said Court, this 26th day of April in the year of our Lord one thousand nine hundred and thirty-two and of our Independence the one hundred and fifty-sixth.

[Seal] R. S. ZIMMERMAN, Clerk.
By C. A. Simmons, Deputy Clerk.

MARSHAL'S RETURN

I have served this writ personally, by copy, on BUCK McGOWAN, L. A. this 27th day of April, A. D. 1932

A. C. Sittel
U. S. Marshal.
By P. J. Hayselden
Deputy.

[Endorsed]: Filed May 5 1932 R. S. Zimmerman, Clerk By Theodore Hocke Deputy Clerk

[TITLE OF COURT AND CAUSE.]

FINDINGS OF FACT and CONCLUSIONS OF LAW.

The above entitled action having come on for trial before the Honorable Harry A. Hollzer, Judge of the above entitled court, on May 4, 1932, the libelant therein appearing by and through Samuel W. McNabb, United States Attorney for the Southern District of California, and Frank M. Chichester, Assistant United States Attorney for said District, and Louis J. Somers, Assistant United States Attorney for said District, and the claimants, Eric Hogstrom and F. E. Kirk, appearing by and through their attorney, John B. Yakey, and a jury having been expressly waived by a stipulation heretofore filed, and evidence, both oral and documentary, having been introduced and memoranda of points and authorities having been filed, and the arguments of counsel having been heard, the Court makes its following findings of fact and conclusions of law:

FINDINGS OF FACT

I.

That the respondent American Gas Screw V-293, her motors, tackle, apparel, furniture etc., were seized by the United States Coast Guard, Section Base No. 17, while standing to sea from San Pedro Harbor in the vicinity of Point Firmin and at a distance of approximately one and one-half (1½) miles from Point Firmin on March 3, 1932; that the said seizure of the said respondent vessel, her motors, tackle, apparel, furniture etc., was thereafter adopted by the Collector of Customs of the Port of Los

Angeles in California, District No. 27; that thereafter and upon the filing of the Libel herein the said vessel, her motors, tackle, apparel, furniture etc., were attached by the United States Marshal pursuant to process regularly issued out of the above entitled court.

II.

That the appraised value of the said respondent vessel, her motors, tackle, apparel, furniture etc., is $4,000.00.

III.

That the respondent vessel was documented in the name of F. E. Kirk for the purpose of fishing and was given the number V-293 by the Collector of Customs for the Port of San Diego on or about October 14, 1931.

IV.

That on March 3, 1932, the said respondent vessel transported certain foodstuffs, tobacco, magazines and merchandise from the Harbor of Los Angeles, California, to a place on the navigable waters of the United States where the said respondent vessel was seized by the United States Coast Guard as heretofore set forth; that the said transportation of the said foodstuffs, tobacco, magazines and merchandise was for a consideration, the amount of which is unknown, and was an engagement in trade by the said respondent vessel.

CONCLUSIONS OF LAW.

From the aforementioned Findings of Fact the Court makes its following conclusions of law:

I.

That the said respondent vessel, together with her motors, tackle, apparel, furniture etc., engaged in a trade

other than that for which she was licensed or documented in violation of Section 4377, R. S., 46 U. S. C. A. 325.

II.

That because of the violation of the said Section 4377, R. S., the said respondent American Gas Screw V-293, together with her motors, tackle, apparel, furniture etc., has become forfeited to the United States of America.

Dated: May 9, 1932.

Hollzer
United States District Judge

APPROVED AS TO FORM as provided in Rule 44:

John B. Yakey
John B. Yakey,
Attorney for Claimants.

[Endorsed]: Filed May 10, 1932. R. S. Zimmerman, Clerk, by M. R. Winchell, Deputy Clerk.

[Title of Court and Cause.]

FINAL DECREE OF CONDEMNATION FORFEITURE AND ORDER OF DISPOSITION

The above entitled action having come on for trial before the Honorable Harry A. Hollzer, Judge of the above entitled court, on May 4, 1932, a jury in said matter having been expressly waived by a stipulation in writing heretofore filed, and the Court having heard all of the evidence, both oral and documentary, introduced on behalf of the libelant, the respondent and the claimants, and having filed its Findings of Fact and Conclusions of Law, and it appearing from all of the evi-

dence introduced at the trial of said action that the respondent vessel, together with her motors, tackle, apparel, furniture, etc., have become forfeited to the United States of America,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED that the said American Gas Screw V-293, together with her motors, tackle, apparel, furniture, etc., be and the same accordingly are condemned and forfeited to the United States of America.

IT IS FURTHER ORDERED that the said respondent vessel, together with her motors, tackle, apparel, furniture etc., be delivered by the United States Marshal for the Southern District of California, to the United States Coast Guard, Section Base No. 17, Los Angeles, California, to be held by the said Commander to await the final disposition of the said vessel pursuant to the order of the above entitled court.

IT IS FURTHER ORDERED that all costs incurred in the seizure, storage, condemnation and forfeiture of the said respondent vessel be paid by the claimants herein, the said costs to be taxed herein in the sum of $331.04. The said costs, when taxed, shall be paid by the claimants or their suretities within four days from the filing of this Decree, upon the giving of notice to the proctor herein appearing for the claimants herein. Service of this Decree upon the said proctor shall be deemed sufficient notice. In the event the costs as taxed herein are not paid within the time heretofore designated, execution shall summarily issue against the claimants, their surety or suretities, their lands, goods and chattels according to their stipulation heretofore filed.

Dated this 9 day of May, 1932.

HOLLZER
United States District Judge

APPROVED AS TO FORM as provided by Rule 44:
John B. Yakey
John B. Yakey
Proctor for Claimants

Decree entered and recorded May 10 1932
R. S. ZIMMERMAN, Clerk
By M. R. Winchell, Deputy Clerk

[Endorsed]: Filed May 10 1932 R. S. Zimmerman, Clerk By M. R. Winchell, Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

REPORTER'S TRANSCRIPT OF TESTIMONY AND PROCEEDINGS ON TRIAL.

APPEARANCES:

For the Libelant:

Frank M. Chichester, Esq.,
Assistant United States Attorney
Louis J. Somers, Esq.,
Assistant United States Attorney

For the Claimants F. E. Kirk and Eric Hogstrom:

John B. Yakey, Esq.,
815 Financial Center Bldg.,
Los Angeles, California.
TRinity 0654.

Reported by
J. E. Healy.

(Testimony of Muller S. Hay)

LOS ANGELES, CALIFORNIA, MONDAY, MAY 16, 1932.

10:00 o'clock A. M.

(This cause coming on regularly for trial this day, the following proceedings were had):

MR CHICHESTER: This matter is an action under Section 4377 of the Revised Statutes in which it is alleged that the respondent vessel was engaged in a trade other than that for which it was licensed, and we have filed with the clerk a stipulation waiving a jury in this matter. I believe that in an admiralty case a jury is not required in any event, but we are taking this extra precaution to avoid any possible question.

THE COURT: Both sides have joined in the waiver?

MR YAKEY: Yes, sir, we have waived a jury, your Honor.

MR CHICHESTER: I will call Commander Hay.

MULLER S. HAY,

called as a witness on behalf of the Government, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR CHICHESTER:

Q What is your business or occupation, Mr. Hay?

A I am a commander in the United States Coast Guard, commanding Section Base Number 17, San Pedro, California.

Q How long have you been so employed, Captain Hay?

(Testimony of Muller S. Hay)

A I have been employed in the Coast Guard 31 years. As commander of Base Number 17, a year and three months.

Q I hand you a document with the signature that purports to be the signature of F. L. Austin, and ask you if you recognize that signature? (Handing document to witness).

A I do.

Q Is that the signature of F. L. Austin?

A That is the signature of F. L. Austin.

Q Who is F. L. Austin?

A F. L. Austin is the aide to the commander of the California Division, United States Coast Guard, San Francisco.

Q I will ask you if you have ever seen that letter before?

A I have.

Q When did you see that?

A It came through the mails and arrived at Section Base 17 about the 27th or 28th of February, 1932.

Q That was received by you in the ordinary course of business with your superior officer in San Francisco?

A It was.

Q And is Mr. F. L. Austin your superior officer in San Francisco?

A Mr. Austin, by direction, is my superior officer as representing the commander of the California Division.

MR CHICHESTER: I offer this document in evidence as Government's Exhibit Number 1.

MR YAKEY: I object to the introduction of the document, if the Court please, on the ground that it is incom-

(Testimony of Muller S. Hay)

petent, irrelevant, and immaterial, and no proper foundation has been laid. It can in no way affect the issues involved in this case. It does not purport, as I understand it, to be what was taken from this boat at the time of its seizure.

MR CHICHESTER: I will offer it, then, for identification. I now offer it for identification. I withdraw the former offer.

THE COURT: It will be marked Government's Exhibit Number 1 for identification only.

(Government's Exhibit Number 1 for identification).

MR CHICHESTER: This letter reads as follows:—

MR YAKEY: (Interrupting) Just a moment. Is that the one you offered for identification?

MR CHICHESTER: Yes.

MR YAKEY: We object to it being read in evidence at this time.

MR CHICHESTER: I do not intend to read the letter in evidence. I do not believe your Honor has had an opportunity to read it. If your Honor has read it, of course, the contents are obvious.

MR YAKEY: It is only offered for identification at this time, and it is not proper to go into evidence until it is admitted.

THE COURT: Yes. What is the question involved?

MR CHICHESTER: This is to lay a foundation concerning the instructions the commander has given to his men in the Coast Guard pursuant to this letter.

THE COURT: Well, until the document is received in evidence, why not proceed without reading from the document?

(Testimony of Muller S. Hay)

MR CHICHESTER: Very well.

Q BY MR CHICHESTER: Captain Hay, after receiving this letter, did you take any steps with respect to the contents thereof?

A I did.

Q What did you do?

MR YAKEY: I object to that, if your Honor please, as being incompetent, irrelevant, and immaterial until that letter has been admitted in evidence.

THE COURT: Well, the witness has testified that he received a communication from a superior officer.

Q BY THE COURT: Did you receive it on or shortly after the day on which it bears date?

A I received it, if I remember correctly, the day after it bears date. It takes about that length of time for mail to arrive to us from San Francisco.

Q Now then, did any vessel under your direction thereafter take any steps with reference to any other boat?

A A vessel under my direction did so.

Q Well, now then, what took place?

A The contents and information contained in this letter was given to the various officers and men in charge of our patrol boats. They were directed to exert themselves and to ascertain if any vessel leaving San Pedro or down on the high seas had quite an unusual amount of provisions on board. Having found such a boat, they were to report the circumstances to me there at the base.

THE COURT: Proceed.

Q BY MR CHICHESTER: When did you next hear from any of your boats concerning any boat about

(Testimony of Muller S. Hay)

which you had given instructions as having an unusually large supply of foodstuffs aboard.

MR YAKEY: We object to the question, if your Honor please, upon the ground that it is incompetent, irrelevant, and immaterial, and not binding upon the claimants in this case unless it refers to this particular boat in question.

MR CHICHESTER: If we get an opportunity to continue, your Honor, this all seems to be relevant.

THE COURT: Yes. You may proceed.

MR YAKEY: May I ask what is the date of that letter?

MR CHICHESTER: February 26, 1932.

THE WITNESS: On the 1st of March we received a radio message from our patrol boat, I think it was number 257, that the American Gas Screw V-293 had been boarded off Point Fermin, and that an unusual amount of provisions was found on board.

Q BY MR CHICHESTER: Did you give any commands to the party making that report to you at that time?

A He was directed to bring the boat to the Base for investigation.

MR CHICHESTER: You may cross examine.

CROSS EXAMINATION

BY MR YAKEY:

Q What date did you say the vessel was seized, the V-293?

(Testimony of Muller S. Hay)

A I said March 1st, but I think it was March 3rd, on second thought. I wish to correct my testimony in that respect.

Q These instructions that you testified to were given by you to the men under you?

A They were.

MR YAKEY: I think that is all. No further questions.

MR CHICHESTER: May it please the Court, we renew our offer at this time of the letter on the ground that it is material, being a letter containing a list of supplies, which with one question on voir dire I can connect with the vessel under seizure in this case.

THE COURT: Do you expect to prove that the vessel, when seized, was found to contain the articles listed in this communication?

MR CHICHESTER: Most of these articles.

THE COURT: Well then, why not withhold the offer until proof is made as to what was found on board?

MR CHICHESTER: The only reason I made the offer was the commander was able to identify the signature, and he testified that letter came in the ordinary course of business.

MR YAKEY: Is it necessary to take an exception to every ruling of the Court?

THE COURT: Yes.

MR YAKEY: That is necessary each time?

THE COURT: Yes.

MR CHICHESTER: That is all.

(Testimony of Stanley M. Megos)

STANLEY M. MEGOS,

called as a witness on behalf of the Government, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR CHICHESTER:

Q What is your business or occupation?

A Chief Boatswain's Mate in the United States Coast Guard.

Q How long have you been so employed?

A I have been in the Coast Guard a little over 7 years and 10 months.

Q And on or about March 3, 1932, were you so employed?

A I was.

Q Will you state to the Court where you were employed and what occurred on or about that time, on the morning of March 3rd?

A On the morning of March 3rd I was officer in charge of the C. G. 257 on regular patrol, patroling between Point Vincente and San Juan Point. Shortly before 6 o'clock we were crossing about northwesterly along the coast towards Point Fermin and sighted the V-293 standing out of the Los Angeles Outer Harbor, made contact and boarded her at 6:10 on March 3rd off Point Fermin. S. W. Gardner, Mate, First Class, was boarding the vessel, and after I put him on board he examined her and reported a large amount of supplies on board, an amount that would exceed the need of two men, which consisted of the crew of the V-293.

Q BY THE COURT: The crew of the V-293 consisted of how many?

(Testimony of Stanley M. Megos)

A Two men. I went up alongside of the V-293 and gave Gardner a list of supplies that we were watching for, that I had received from Commander of Section Base 17, and I gave this list to Gardner so he would check the supplies on board the V-293. After a short interval Gardner reported that the supplies consisted of about one-third that the list called for.

MR YAKEY: We object to the answer and move it be stricken. The best evidence as to what the goods consisted of would be a list of the goods themselves.

THE COURT: The last statement of the witness is ordered stricken out.

MR CHICHESTER: Proceed.

Q BY THE COURT: After you received a report from one of your men what happened next?

A I asked the captain of the V-293—

Q Who was that?

A Eric Hogstrom.

Q Do you see him in the court room?

A I do, yes, sir. He is sitting on the left there.

THE COURT: May we ask counsel for the spelling of the name of the captain of the V-293.

MR YAKEY: Eric Hogstrom—E-r-i-c H-o-g-s-t-r-o-m. He is one of the claimants in the case.

Q BY THE COURT: Now, you say you asked the captain of the V-293, Mr. Eric Hogstrom—

A (Interrupting) Where he was bound for, and he replied, "Bound for San Clemente Island," and then I asked him who the supplies were for, where they were for, whether they were for his own use or whether he was taking them somewhere, and he told me he was taking

(Testimony of Stanley M. Megos)

them to a fisherman on San Clemente Island. I asked if he had any manifest aboard, and he said, "No,"—that the only thing he had—I asked the boatswain's mate if he had a license, and he said, "No," that the only license aboard was a fishing license. So I notified the Base by radio the circumstances, and I was directed to bring the V-293 to the Base for further investigation.

Q BY MR CHICHESTER: Didn't you ask him at the time what the name of the fisherman was on San Clemente Island that he was taking these goods to?

A I did, but I don't recall.

Q You don't recall what his answer was?

A I do not.

Q Was anything else said at the time that you recall?

A After I had received a reply to my message to the Base to bring the V-293 to the Base for further investigation, I told the boatswain's mate aboard the V-293 what orders I had received and to stay aboard and take her in to the Base.

Q When you refer to the boatswain's mate, to whom do you refer by name?

A Gardner, Boatswain's Mate, Third Class.

Q BY THE COURT: His last name is Gardner?

A G-a-r-d-n-e-r.

Q BY MR CHICHESTER: Was there anyone else aboard the V-293 other than Mr. Eric Hogstrom at the time you boarded her?

A A man who had given his name as Johnson.

Q Did he say anything at the time?

A I do not recall.

(Testimony of Stanley M. Megos)

Q You referred to a fishing license, Mr. Megos. What kind of a fishing license was it, if you know?

A The number of it is 2792; it is posted on the hatch of the engine room.

Q Was that a California fishing license?

A Yes.

Q Issued by the State of California?

A Yes.

Q Did you notice any fishing tackle aboard the boat at that time?

A I was not aboard the boat at that time, but I was aboard the boat when she was brought into the Base, when we arrived at the Base, and there was no fishing tackle aboard the vessel.

Q That was at the Base?

A Yes.

Q How far were you from the boat when she was proceeding from the point of seizure to the Base?

A I was never over a quarter of a mile astern.

Q Did you see anything thrown overboard during the trip in?

A I did not.

Q Did you see any guns aboard the boat at that time, of any kind?

A I did not.

Q Was there any ammunition of any kind aboard the boat?

A I did not see any.

Q I hand you five pictures. First, I will refer to them singly. The first picture I hand you and will ask you what that picture is, if you know?

(Testimony of Stanley M. Megos)

A It is a picture of the Gas Screw V-293 lying alongside of the towboat 257 by the dock of Section Base 17.

Q Were you present when the picture was taken?

A I was.

MR CHICHESTER: I offer the picture in evidence as Government's Exhibit Number 1.

THE COURT: The same will be marked Government's Exhibit Number 2.

(Government's Exhibit Number 2).

Q BY MR CHICHESTER: I hand you another picture and ask you what that is?

A This is a picture of the same vessel at the same place, but a stern view.

Q You were present when that picture was taken?

A I was.

MR CHICHESTER: I offer it in evidence as Government's Exhibit Number 3.

THE COURT: So marked.

(Government's Exhibit Number 3).

Q BY MR CHICHESTER: What is this picture which I now show you? (Handing picture to witness).

A This is a picture of the supplies taken from the V-293 and put on board at the bow of the C. G. 257 at Section Base 17.

Q You were present when that picture was taken?

A I was.

MR CHICHESTER: I offer it in evidence.

THE COURT: The same will be marked Government's Exhibit Number 4.

(Government's Exhibit Number 4).

(Testimony of Stanley M. Megos)

Q BY MR CHICHESTER: What is this picture which I now show you? (Handing picture to witness).

A This is a view of the same supplies taken on board the C. G. 257, but at a different angle.

MR CHICHESTER: I offer it in evidence as Government's Exhibit next in order.

THE COURT: It will be marked Government's Exhibit Number 5.

(Government's Exhibit Number 5).

Q BY MR CHICHESTER: What is this picture? (Handing picture to witness).

A This is a view of the stern, of the cockpit of the V-293, at Section Base 17, with the skidboard in place.

Q You were present when this picture was taken?

A I was.

MR CHICHESTER: I offer it in evidence.

THE COURT: That was taken of the boat when seized?

A Yes, sir.

THE COURT: It will be marked Government's Exhibit Number 6.

(Government's Exhibit Number 6).

Q BY MR CHICHESTER: Did you weigh the supplies taken from the V-293?

A I did.

Q Do you know what that weight was?

A I do not recall the exact weight, but it was over 1200 pounds gross weight.

Q Do you have a list of the cargo of the foodstuffs that you were to look out for?

(Testimony of Stanley M. Megos)

A I did. I turned in the itemized list to the commander of Section Base 17.

Q At the time or prior to the time of seizure did you have a list of goods that you were to look out for?

A Prior to the time of departure for the patrol I received a letter from the commander of Section Base 17 with a list of goods we were supposed to look out for, outbound or on the high seas.

Q Do you have that list with you?

A I do not; it is on board the vessel.

Q Where is it?

A It is on board the C. G. 257.

Q I will show you Government's Exhibit for identification Number 1 containing a list of foodstuffs, and ask you if that list compares with the list received by you from the commander of Section Base 17?

MR YAKEY: I object to the question on the ground that it is incompetent, irrelevant, and immaterial. The stuff that was found on the V-293—whether it compared with this—that is a matter of comparison and not one of opinion of the witness.

THE COURT: Of course, that matter may be covered in another way. Has anyone in the court room a list of the commodities seized?

THE WITNESS: I believe Commander Hay has.

THE COURT: When someone is prepared to identify the list, perhaps you gentlemen can agree as to what was on board. Is there any controversy as to what was on this boat?

(Testimony of Stanley M. Megos)

MR YAKEY: I don't know, your Honor. We have a list, and it approximates, as given from memory, the supplies on the boat.

MR CHICHESTER: I have here a certified copy purported to be signed by Stanley M. Megos of the list of provisions found on the V-293 on March 3, 1932.

THE COURT: Let the witness identify it.

Q BY MR CHICHESTER: I will ask you if that is your signature on the bottom of the document I now hand you?

A That is my signature.

MR YAKEY: Just a moment, please. If you will let us check this, Mr. Chichester. So that the court will understand it, we have here and are willing to submit it, a bill from the Henderson Meat Market, a list of the stuff purchased and taken aboard the boat.

MR CHICHESTER: If properly identified, we have no objection to such a list, but whether or not it compares with the list taken from the boat, we do not know.

MR YAKEY: If we check it up, and it compares, there is no dispute.

MR CHICHESTER: We offer this document which has been identified over the signature of Mr. Megos.

MR YAKEY: May I ask this question, preliminarily.

Q BY MR YAKEY: Mr. Megos, did you make this list yourself?

A I made that list myself.

MR CHICHESTER: Any objection?

MR YAKEY: I think not—for what it is worth.

(Testimony of Stanley M. Megos)

THE COURT: It will be received as Government's Exhibit Number 7.

(Government's Exhibit Number 7).

MR YAKEY: Simply as a memorandum of what he got aboard the boat.

MR CHICHESTER: You may cross examine.

CROSS EXAMINATION

BY MR YAKEY:

Q Mr. Megos, to what place did Captain Hogstrom say he was bound for?

A San Clemente Island.

Q Didn't he tell you he was bound for Santa Cruz Island?

A No, he did not.

Q Where is San Clemente from Santa Cruz Island?

A From Santa Cruz Island, roughly, about 90 miles.

Q What is that?

A Roughly, about 90 miles south of Santa Cruz Island.

Q BY THE COURT: Well, in the first place, what is the approximate distance and direction of Santa Cruz Island from San Pedro or the Harbor?

A Santa Cruz Island is about West a half, North two of the San Pedro light. San Clemente Island is about—the eastern end of San Clemente Island, Pyramid Head, is about South, a quarter West of San Pedro light.

MR CHICHESTER: We may be able to expedite matters. We have a chart showing San Clemente Island and Santa Cruz Island.

THE COURT: That is produced here from the Government's files?

(Testimony of Stanley M. Megos)

MR CHICHESTER: This particular chart was found by me yesterday on the vessel, on the V-293.

THE COURT: Do you want to set it up on the board here?

MR CHICHESTER: Yes, if we may.

THE COURT: Maybe it will help us out.

(Map placed on blackboard).

Q BY MR CHICHESTER: Will you step to the chart and point out to the Court the approximate location of the seizure of the V-293 on March 3rd and also the location of Santa Cruz Island and San Clemente Island?

A Santa Cruz Island is here. (Indicating). San Clemente Island *Island* is here. (Indicating). San Pedro light is here. (Indicating). The seizure of the V-293 was about in there. (Indicating).

MR CHICHESTER: May it please the Court, I suggest that the witness mark the points indicated for facility.

THE COURT: Are you offering the map in evidence?

MR CHICHESTER: Yes, sir, I intend to offer it in evidence.

THE COURT: The map will be marked Government's Exhibit Number 8.

MR YAKEY: For the purposes of illustration.

THE COURT: Yes, it will serve to illustrate and clarify the testimony. Now then, have we any red crayon or red pencil? Will you mark the figure 1, the place where the V-293 was seized.

THE WITNESS: This is a small scale map, your Honor, and it is very hard to determine.

THE COURT: We understand it will be an approximate location.

(Testimony of Stanley M. Megos)

THE WITNESS: Bearing on the San Pedro light at the time, it was 32° true.

THE COURT: You have marked that "1", the approximate place where you seized the vessel.

MR CHICHESTER: Mark it large enough, if you will, please.

THE COURT Now then, mark San Clemente Island with the figure "2", and marked Santa Cruz Island with the figure "3".

(Witness marks map on blackboard as indicated).

MR CHICHESTER: Now, will you state what direction the V-293 was headed at the time you hailed her?

A She was headed south by southwest, magnetic.

Q With respect to San Clemente Island, will you indicate on the chart the approximate general direction of the vessel?

A She was heading in a general direction to the north, the west end of Santa Catalina Island.

Q Did you take the bearings at the time.

A I took bearings at the time of Point Fermin light and San Pedro Bay light.

Q About how far from the mainland was it, from the end of the breakwater?

A About a mile and a half, about a mile or a mile and a half.

Q What was the color of the vessel?

A Similar to a battleship gray.

MR CHICHESTER: I believe that is all.

CROSS EXAMINATION (resumed).

BY MR YAKEY:

Q Mr. Megos, did you see aboard the V-293 its local award of identification number; did you see it at the time that you made the seizure?

(Testimony of Stanley M. Megos)

A I don't understand the question.

Q Do you know what I mean by a local identification number?

A Is that the Customs House number assigned to a vessel?

Q Yes, the number that is assigned to a vessel.

A Yes, she has it on each bow.

Q Did you see the certificate?

A I was not aboard the vessel at the time.

Q You were not aboard the vessel yourself. You did not go aboard the vessel?

A. I did not, not at that time.

Q When did you take a list of the goods that were aboard?

A After she was brought in to Section Base 17.

Q Did you see the certificate of award of local identification number on board the boat?

A I do not recall.

Q You do not recall ever seeing that. Do you know what the boat was operating under, whether under a local identification number?

A She had a fishing license posted on her half deck.

MR CHICHESTER: We will stipulate that this boat was operating under the identification number V-293.

Q BY MR YAKEY: The license you referred to was a license issued by the State of California and not by the Government?

A It is.

Q You say where the boat was seized was about a mile and a half out from the end of the breakwater?

A Between a mile and a mile and a half.

(Testimony of Stanley M. Megos)

Q Is there a buoy out there?

A Not in that vicinity. There is a buoy off Point Fermin.

Q At the time that you had this conversation with Captain Hogstrom in regard to where he was going, did he show you a letter from anyone?

A He did not.

Q And you never saw any letter from anyone he had received?

A I did not.

Q During any interview that you had with Captain Hogstrom?

A I did not.

Q Didn't he tell you who he was going to see at the time that you had him arrested, that is, as to his destination?

A At what time?

Q At the time of the seizure.

A Before he was brought in to the Base, he said he was going to some fisherman's place at San Clemente Island with the stores.

Q And did he give the name of the fisherman?

A I do not recall what name he said.

Q Would you recall it if you heard it?

A I do not believe so.

Q Was it Englund? Does that sound familiar to you?

A It did not sound like that at the time.

Q At the time that you made the seizure you had no trouble in getting Captain Hogstrom to talk to you, did you?

MR CHICHESTER: That is objected to as calling for the conclusion of the witness and clearly incompetent in this case.

(Testimony of Stanley M. Megos)

MR YAKEY: I will withdraw that question.

Q BY MR YAKEY: Captain Hogstrom freely answered any questions that you asked him, did he not?

A He did.

Q And you found no liquor aboard?

A I was not aboard the vessel at the time.

Q Did any of your men report as having found any liquor aboard?

A They did not.

Q Did you check the equipment of the boat at the time the seizure was made?

A I did not.

Q. Did you check it at any time thereafter?

A I did not take an itemized copy of it.

Q Did you notice any other violation of any rule or regulation, either of the statutes or the regulations of the department with regard to the equipment of the boat, as to its lights or whistles and so forth?

A There were no violations reported by the boarding officer?

Q It is customary immediately on making a seizure of that kind to check and ascertain those facts?

A Her equipment as far as the motor boat laws were concerned was checked by the boarding officer when he went aboard her.

MR YAKEY: All right, that is all.

REDIRECT EXAMINATION

BY MR CHICHESTER:

Q What type of vessel is this V-293?

A She is a speed boat with a Liberty, with a Lee conversion.

(Testimony of Stanley M. Megos)

Q What does that mean, does that refer to the motor?

A It refers to the motor—and 300 horsepower, if I recall it correctly.

Q How many cylinders in the motor, if you recall?

A I believe a Liberty is 8 cylinders.

Q What would be the approximate speed of that boat?

MR YAKEY: If he knows.

A I do not know the speed of the vessel.

Q BY MR CHICHESTER: Are you able to approximate the speed from your experience with boats of that type? You may answer yes or no to that.

A Yes.

Q What would you estimate the speed of that boat to be?

A About 26 knots.

Q 26 knots per hour?

A Per hour.

Q What would that be approximately in miles per hour?

A Roughly, a knot is 1.8 statute miles.

MR YAKEY: Read that answer, please.

THE WITNESS: 1⅛ statute miles.

Q BY MR CHICHESTER: Have you had an opportunity to see fishing boats in and out of the harbor in San Pedro?

A I have.

Q Was this boat built as a fishing boat is built?

MR YAKEY: We object to that, if the Court please, unless he knows what it was built for.

MR CHICHESTER: I am asking him if it was built as a fishing boat is built?

(Testimony of Stanley M. Megos)

A I have never seen a fishing vessel on this coast with a Liberty motor in it engaged in the fishing trade.

Q BY MR CHICHESTER: Did it have any equipment for icing any fish?

A It did not.

Q You have already stated there was no equipment for engaging in fishing?

A There was not.

Q What would be the approximate gasoline capacity of this vessel, if you know?

A I do not know her gasoline capacity.

MR CHICHESTER: That is all.

THE COURT: Now, you said this boat, the V-293, had no facilities for icing fish. Do the fishing boats found along this coast have facilities for icing fish?

A The biggest percentage of them have, sir.

Q BY THE COURT: What do you mean by the biggest percentage?

A Except small fishing vessels that go out for a few hours off the coast.

Q Would you call the V-293 of the type that ordinarily goes out for only two or three hours?

A He has been sighted, sir, 150 miles from port.

MR YAKEY: May I have that last answer read? Do I understand the witness to testify that this boat had been seen 150 miles off; is that what you said?

THE WITNESS: Her type of vessel has been seen, but I have seen her off San Clemente Island.

FURTHER REDIRECT EXAMINATION

BY MR CHICHESTER:

Q About how many miles from shore is that?

(Testimony of Stanley M. Megos)

A San Clemente Island is about 48 miles from San Pedro.

Q In other words, it is a typical speedboat?

A It is.

Q Is there any place aboard the boat, any facilities for storing fish if they had been caught?

A There is a place to stow fish, but they would not last very long.

Q You are referring to the open cockpit in the stern of the vessel?

A Yes, sir, the open cockpit.

MR CHICHESTER: That is all.

FURTHER RECROSS EXAMINATION

BY MR YAKEY:

Q In a boat of the type of the V-293, you say that this boat in your opinion would make 26 knots?

A 26 knots.

Q What was the horsepower of the motor in that boat?

A I believe they are rated at 300 horsepower.

Q Do you know what it was, 300 horsepower?

A 300 horsepower.

Q Do you know whether it was an old engine or a new one, in fact?

A I am not a mechanic, sir.

Q You didn't make any examination of the motor of the boat or the boat itself to ascertain what speed it would probably make?

A I looked at the motor, but as I say, I am not a mechanic, and I cannot judge the condition the motor is in.

(Testimony of Stanley M. Megos)

Q. Have you ever seen a boat of that size on a trial course, a boat of that size and dimensions?

A I have seen them similar to that size, but not with a Liberty motor in them.

Q How do you base your opinion on this boat that she would go 26 knots? That would be nearly 30 miles an hour, would it not?

A The C. G. 257 had an approximate speed of 13½ knots an hour going into the Base. I do not know that the V-293 was going as fast as she could, but one time she was just about doubling my speed when I was following her in to the Base, and I had to blow my whistle to slow her down.

Q What speed was she making?

A C. G. 257 was traveling at approximately 13½ knots at the time, and she was approximately doubling my distance.

Q And that would be approximately 15 statute miles, wouldn't it? Did you mark it off on the chart or make any calculation as to the speed that she was making?

A No, I did not.

Q You are only speaking now from your memory and guess?

A I am speaking from my experience as a seafaring man.

MR YAKEY: I think that is all.

MR CHICHESTER: That is all, Mr. Megos.

(Testimony of Allen Loyal Lundberg)

ALLEN LOYAL LUNDBERG,

called as a witness on behalf of the Government, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR CHICHESTER:

Q What is your business or occupation, Mr. Lundberg?

A Chief Boatswain's Mate, United States Coast Guard.

Q How long have you been so employed?

A 7 years and 11 months.

Q About how long?

A 7 years and 11 months.

Q Were you so employed during the month of February of 1932?

A Yes.

Q And at any time during that month did you have occasion to contact the V-293?

A Yes.

Q Approximately what date was that?

A That was on the 28th day of February?

Q You are referring now to certain notes?

A Yes, sir, this is a boarding book.

Q Those notes made in the references were made by you?

A Yes, at the time and a few minutes after I boarded this boat I entered it in this book.

Q What was the date again?

A That was at 10:30 in the evening of February 28th.

Q Where was the boat?

(Testimony of Allen Loyal Lundberg)

A The boat was standing in the Los Angeles Harbor from seaward.

Q Did you stop the boat?

A Yes.

Q Did you come alongside?

A Yes.

Q What happened then?

A I came up alongside the boat at the pilot house, and I sent a man to go through the boat, the V-293, and inspect her and look her over, and I chanced to meet a well-known rum runner that I had occasion to bring in a time before, and during this time—

Q (Interrupting) Who was this rum runner?

A His name was Johnston.

MR YAKEY: I object to this, your Honor. This was on February 28th. The boat was seized on the 3rd of March, and I cannot see—she is not charged with any violation of the liquor laws; she is only charged, so far as the testimony shows now, with violating her license, and I cannot see how even if there was someone aboard who was a noted bootlegger, how that could be material in determining the issues in this case.

MR CHICHESTER: This boat was licensed to fish. Now, that license was good from the time it was issued in October of 1931—

MR YAKEY: (Interrupting) The boat never was licensed.

MR CHICHESTER: Well, a number was given for the purpose of fishing, and this testimony is for the purpose of showing that at no time within the experience of the witnesses we can produce has this boat ever shown

(Testimony of Allen Loyal Lundberg)

any evidence of having been fishing or having anything to do with the fishing industry.

MR YAKEY: They cannot establish that fact by attempting to show that there was somebody found aboard the boat that had been in the liquor business, the bootlegging business.

THE COURT: Well, our thought is that the witness may describe the conditions existing on the boat on February 28th, namely, three or four days prior to the seizure.

MR YAKEY: Yes, sir, I think your Honor is correct in that, but as to who was there, whether some criminal happened to be aboard the boat at the time, is not material.

THE COURT: I think the witness should be instructed to merely describe the conditions existing on the boat, without reference to anything else.

MR CHICHESTER: I have one observation with respect to probable cause which is pertinent to this particular case.

THE COURT: What is that?

MR CHICHESTER: I believe that the statement of the witness concerning the presence of anyone aboard the boat would go to establish probable cause for seizing that boat on a subsequent date under any suspicious circumstances and this circumstance would be in itself sufficient to base a probable cause or a reasonable cause for seizing that boat under suspicious circumstances. Probable cause is necessary in diverting a crew under Section 615 of the Tariff Act.

MR YAKEY: But on the other hand, you can not prove that the man who was on board the boat was a

(Testimony of Allen Loyal Lundberg)

notorious bootlegger by oral testimony in this way, and he is not here as a witness.

THE COURT: We will allow the witness to proceed. It may be the proof will fall short of the purpose contended for by the Government, but we will allow it for whatever it may be worth. You may proceed and tell us what you found on the boat.

MR YAKEY: Exception, please.

THE COURT: Yes.

A The boat had no cargo aboard. The boat was found empty, and there was three people aboard the boat at that time, three men.

Q BY MR CHICHESTER: Who were they?

A Mr. Hogstrom, and Johnston, and a third man I could not identify on account of the darkness; I did not ask his name.

Q What was the name of Mr. Johnston?

A Mr. Johnston, he has a few more names that he goes by occasionally when you see him out there; he calls himself Emerson at times, or Bowman; that is all I can recall.

Q H. L. Johnston, is that his name?

A Yes, sir, that is one of his names.

Q Did you have occasion to go on board or get inside the V-293 at that time?

A No, I did not go aboard at that time. I had part of my body over on his boat, because I leaned from my pilot house into his, to identify the man running the boat.

Q Did you notice any peculiar odor at that time?

(Testimony of Allen Loyal Lundberg)

A Yes.

Q What was that odor?

A There was a faint odor of liquor.

MR CHICHESTER: That is all.

CROSS EXAMINATION

BY MR YAKEY:

Q Do you know where that liquor came from?

A I could not say where it came from.

Q Was it close to the man you were talking to?

A No, the man that I was talking to, that stood closest to me, I could not say that that odor came from him.

Q. Did you make an investigation of the boat to ascertain at that time where this odor came from?

A Yes, sir, a man went through the boat, but he could not find any.

Q He could not find any liquor aboard the boat or any signals of any liquor?

A There was no liquor found on the boat and no signs of liquor on the boat excepting the odor of liquor.

Q. What did you go aboard the boat for at that time?

A I did not go aboard the boat. I had one of my crew go aboard the boat. I sent one of the crew aboard the boat.

Q And this smell of liquor that you got, where were you at the time that you got that?

A At that time I had my head in the V-293 pilot house.

Q You had your head in the pilot house?

A Yes.

Q I thought you did not go aboard her?

(Testimony of Allen Loyal Lundberg)

A I did not go aboard her. I only got my head aboard that boat, and my elbows.

Q Standing on your boat and putting your head in the pilot house of the V-293?

A Quite right.

Q What did the man go aboard the V-293 for at that time?

A Beg pardon?

Q BY THE COURT: Why did you send one of your crew on board the V-293 that night?

A I sent a man to inspect and search this boat to see what could be found.

Q BY MR YAKEY: You did not go aboard the boat yourself?

A I did not.

Q And you made no inspection of the boat except to send a man aboard to see if there was any liquor there?

A That is quite right.

Q And did you at that time inspect the boat's documents and lights and bells and so forth?

A No.

Q And yet that was your duty and your instructions?

THE COURT: One moment. You need not answer that. Let us not argue with the witness, whether he discharged his duties or not.

MR YAKEY: I did not mean to argue with him. It was simply the way I put the question, your Honor. I think that is all.

REDIRECT EXAMINATION

BY MR CHICHESTER:

Q Did you see any fishing tackle, any nets or any poles or any lines at the time you looked aboard that vessel?

A No.

MR CHICHESTER: That is all.

(Testimony of Lieutenant John Hay Fletcher)

LIEUTENANT JOHN HAY FLETCHER,

called as a witness on behalf of the Government, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR CHICHESTER:

Q What is your business or occupation?

A Lieutenant, United States Coast Guard.

Q How long have you been so employed?

A Approximately 7½ years.

Q Were you so employed on March 3rd of this year?

A I was.

Q Tell the Court what occurred with respect to the V-293 at that time that you had personal contact with.

A Upon receiving information that the V-293 was being brought to port for investigation, I immediately went to the dock and made an inspection of the boat and a more or less casual inventory of the stores that were aboard, and then questioned the master Eric Hogstrom, and one other member of the boat's crew whom I recall at this time as giving the name of Larsen.

Q What did Mr. Hogstrom say at that time?

A He was rather vague when asked as to where he was taking the supplies, and finally stating that he was taking the supplies to Santa Cruz Island. I asked Hogstrom to give me a list of the supplies from his memory. This he was unable to do except to name several of the larger items. I asked him where he had purchased the provisions, and he stated at a market in Los Angeles. I asked him if he had paid for the stores, and he told me he had. I asked him what they cost, and he told me he didn't pay for them. I asked him who the people were

(Testimony of Lieutenant John Hay Fletcher)

where he was to take these stores at Santa Cruz Island, and he stated to some friends of his.

Q Did he say who those friends were; did he name them at that time?

A He may have, but I cannot recall the name, but the name of Englund does sound familiar as the name that he gave me. I asked him how long he was going to stay at the island, and he informed me, "10 days to 2 weeks."

Q Did you talk to Mr. Larsen at that time?

A I did.

Q What did he say?

A Not a great deal of anything. His answers were not consistent and with very little—

MR YAKEY: Just a minute, please.

THE COURT: Yes, sir, the statement that the answers were not consistent is ordered stricken out.

Q BY MR CHICHESTER: Do you recall any particular questions that you put to him and the answers he made to those questions?

A I do.

Q What were those questions?

A I asked Larsen where he was going, and he said, "To an island." I asked for what purpose, and he informed me that he was just going, for no particular purpose. I asked him who the stores belonged to, and he stated, "The captain"—or "master". I believe he used the word "master" instead of "captain".

Q Did he say anything else?

A He did, but I cannot recall.

MR YAKEY: Just a minute. Is this in the presence of Captain Hogstrom, in the presence of the master?

(Testimony of Lieutenant John Hay Fletcher)

A It was not. They were held separately.

MR YAKEY: Then, if the Court please, I move to strike out all the testimony in regard to what was said by anyone else on board the boat which was not done in the presence of one of the claimants in this case, who was not a party to this action. We are not bound by any statements that this man may have made.

MR CHICHESTER: This is an action in rem against the boat, and any of the statements of the crew would be material in regard to the activities of that boat.

THE COURT: The motion will be denied.

MR YAKEY: Exception.

Q BY MR CHICHESTER: Thereafter what did you do, Lieutenant?

A I had an inventory of the stores made and had the stores photographed and searched the boat for evidence of fishing gear.

Q Did you find any?

A I did not.

Q Did you find any guns or ammunition?

A I did not.

Q Proceed.

A And I questioned Hogstrom further and held him as a witness until about 8 o'clock on the evening of the 3rd, at which time I went to his home.

Q Who else went with you?

A Mr. McFarland.

Q And who else? Was Mr. Hogstrom along?

A Mr. Hogstrom was with us at that time.

Q The three of you?

A The three of us went to him home.

(Testimony of Lieutenant John Hay Fletcher)

Q Where is his home located?

A It is located in San Pedro on Kerkoff Street. I do not recall the number, but it is between 23rd and 24th, I believe.

Q What happened on that occasion?

A Mrs. Hogstrom was asked—

Q Just a minute. Where did this conversation take place, and who was present, and about what time was it?

A In the home of Eric Hogstrom in the presence of Mr. McFarland, Mrs. Hogstrom, and Hogstrom. Mrs. Hogstrom was asked where her husband was going and when he left home that morning. She said, "I don't know." We asked how long he was to be away, and she said, "I don't know." We asked if he was to be away 10 days or 2 weeks, and she made no reply. Hogstrom asked her to produce a letter from "those people."

Q Did he name the people?

A He did not at that time. She said, "What letter?" He said, "The letter we got the day before yesterday from those people, those people on the island; you know the ones." With that she produced a letter signed by the name "Englund." I believe it was a Mrs. Englund that wrote the letter. Hogstrom asked his wife for something to drink. She said she had nothing to drink. He said, "I want milk." She said, "There is some in the ice box, and your supper is ready for you on the table."

Q What was that again?

A She said there was milk in the ice box, and that his supper was ready for him on the table.

Q Did you see the supper on the table?

(Testimony of Lieutenant John Hay Fletcher)

A I did not. I did not go into the kitchen.

Q Were you able to see from where you were?

A No, but on leaving the house I could see from one room to another, and there were dishes on the table.

Q Was there anything else said at that time that you recall now?

A We asked—the question was put to Mrs. Hogstrom if she had planned on going to Santa Cruz Island, and she said, "No," not at that time.

Q Do you recall whether or not she was surprised to see you appear?

MR YAKEY: That is objected to as calling for the conclusion of the witness.

MR CHICHESTER: I withdraw the question.

Q BY MR CHICHESTER: What was the action or reaction of Mrs. Hogstrom when you appeared in her home?

MR YAKEY: We object to that as calling for the opinion or conclusion of the witness and is incompetent, irrelevant, and immaterial.

THE COURT: He may answer as to what he observed in the presence of Mr. Hogstrom, what took place as he entered the house.

MR YAKEY: Exception.

A Mrs. Hogstrom at first appeared to be greatly disturbed or perturbed. She later gained her composure after approximately 5 or 10 minutes of conversation. There was a decided change in Mrs. Hogstrom's attitude or bearing from the time I first entered her home until we departed. Hogstrom was asked if he had any facilities at his home for taking care of the fresh beef, ap-

(Testimony of Lieutenant John Hay Fletcher)

proximately 50 pounds that was aboard his boat, as it was highly perishable, and the weather was warm. This he stated he could do. He said he could put it in his ice box.

Q You have been aboard the V-293?

A I have.

Q Have you examined the construction of the stern of the vessel?

A I have.

Q. I will show you Government's Exhibit Number 6, what purports to be a picture of the stern of the vessel and ask you if you can describe how that vessel is built at that part?

A This stern and the compartment immediately forward is known as an open cockpit boat, with movable bottom boards which lead directly into the bilge. In this particular boat there is a movable board.

Q Will you demonstrate on the blackboard just how that removable board operates, if you can, referring to this particular boat?

A (Witness at blackboard). As a profile of the boat we will say this is the stern, (Indicating) and this would be the waterline of the boat. There is a small counter on which is a roller for sliding off the door. This is the open cockpit. (Indicating) There is a side goes in here, a side to the boat. (Indicating) . This comes up to the engine room and the pilot house here. (Indicating). This is the deck line along here. (Indicating) In the side of the boat is a movable skid, a movable board which fits against cleats in this fashion. (Indicating). The top of the board and the bottom of

(Testimony of Lieutenant John Hay Fletcher)
the board merely rest against cleats. The side of the cockpit has a board placed at an angle which forms a direct chute butting up against the lower end of this movable board. The bottom boards are open and movable, which lead directly into the bilge. The dory of the boat fits on a skid or frame up above this open cockpit in this fashion. (Indicating).

Q What is the function of that skid board that you referred to, together with the two boards on the respective sides which form the chute?

A The board is used, I presume, for getting rid of the cargo or something that could be slid up over it. It has no practical value from a seagoing standpoint.

MR YAKEY: We object to that and move the answer be stricken, particularly that portion where he presumes what it could be used for.

THE COURT: Well, the answer will be stricken out, and we will ask the witness, from your experience as a seafaring man, having in mind this particular boat, the V-293, what purpose would such a board as you describe serve; what purposes could it be made to serve?

A The only purpose that I know it could be made to serve would be as a chute to dispose of something in a hurry, as a slide or a skid.

Q BY MR CHICHESTER: How would that operate?

A The speed of the boat lowers the stern and raises the bow. That is known as planing in a boat, which brings the skid board nearer to a horizontal position; it would be at a slight angle, and any object to be removed

(Testimony of Lieutenant John Hay Fletcher)

could be slid out over this board with a convenient roller on the stern.

Q You have seen the "Diatone", have you not?

A I have.

Q With respect to this boat, what was the type of construction?

A Very, very similar.

MR YAKEY: We object to that as incompetent, irrelevant, and immaterial, how the "Diatone" was constructed. We are not trying the "Diatone".

MR CHICHESTER: It goes to the experience of the witness with this type of boat.

THE COURT: We will sustain the objection.

Q BY MR CHICHESTER: Have you seen other boats built like this boat?

A I have.

Q Where did you see those boats?

A In and around the harbor and on the beach.

Q You may answer this question yes or no. Do you know whether or not the V-293 was prior to the seizure on March 3rd on any suspected list given to you by the Customs agents?

A It was.

MR YAKEY: That is objected to, if your Honor please, as incompetent, irrelevant, and immaterial. We are not here to answer what some agent might suspect.

THE COURT: Yes, it would hardly seem that someone else's suspicions would be competent. The answer will be stricken out.

(Testimony of Lieutenant John Hay Fletcher)

Q BY MR CHICHESTER: Have you had an opportunity to go aboard fishing boats in the harbor of San Pedro?

A I have.

Q Have you ever seen any fishing boat constructed similarly to the construction of this boat?

A Not for commercial fishing.

Q Have you seen any boat so constructed that was engaged to do any commercial fishing?

A Not so constructed, no.

MR CHICHESTER: That is all.

CROSS EXAMINATION

BY MR YAKEY:

Q What time on March 3rd was it, what hour, that you made the inspection of the V-293?

A Approximately 7:30 or a quarter to 8.

Q At the Base where she was tied?

A At the Base.

Q For what purposes did you inspect it?

A To investigate the report of this excessive quantity of stores that she was reported to have aboard.

Q Did you inspect her for any other purpose?

A I inspected her to see if any papers or documents were on board.

Q What kind of documents do you refer to?

A Such as manifests, for the cargo.

Q Do you know whether or not a boat of that size is required to have any manifests?

A Under some circumstances, if she was clearing for foreign with cargo, I believe she would; she would have to be a registered vessel, but this vessel was not.

(Testimony of Lieutenant John Hay Fletcher)

Q If she went to a non-contiguous territory, would she have to have a manifest? A I do not know.

Q BY THE COURT: What do you mean by the last answer?

A I do not know whether she would be required to have a manifest if she went to a non-contiguous country.

Q BY MR YAKEY: Did you inspect her for any violation of the Navigation Laws?

MR CHICHESTER: That is objected to as immaterial. It is not in issue in this matter. We have alleged only one violation.

THE COURT: What is the purpose of this question?

MR YAKEY: Beg pardon?

THE COURT: What is the purpose of this last question?

MR YAKEY: Simply for the purpose of showing as to whether or not the boat was properly equipped and was not violating any other provisions of the Navigation Laws.

THE COURT: The Government is not making any other charge.

MR YAKEY: That is true.

Q BY MR YAKEY: Did Mrs. Hogstrom show you a letter at the time that you were there?

A Yes, sir, Mrs. Hogstrom produced a letter.

Q I show you this document and ask you if that was the letter that she showed you? (Counsel handing document to witness).

A Certain portions of it, I believe, I could identify.

Q Just read it.

A I believe this is the letter.

(Testimony of Lieutenant John Hay Fletcher)

MR YAKEY: May we have that marked for identification as Respondent's Exhibit Number 1.

THE COURT: Mark it as Respondent's Exhibit A.

MR CHICHESTER: We have no objection to the letter, may it please the Court.

THE COURT: Are you offering it in evidence at this time?

MR YAKEY: Yes, sir, we will offer it in evidence at this time if there is no objection.

THE COURT: Very well.

(Respondent's Exhibit A).

Q BY MR YAKEY: This board that you testified to on the stern of the boat, known as a skid board, that could be used and is used, is it not, on boats that have them for the purpose of launching a small boat or tender that they carry with them to go ashore?

A No, sir, it would be impractical.

Q Would you say that a board of that kind is not used for that purpose?

A I beg pardon, sir.

Q Would you say that an arrangement of that kind could not be used for that purpose?

A No, sir, the construction of the board would not support the weight of the dory.

Q It would depend upon how much the dory weighed, how big the dory was?

A Was that a question?

Q That would be according to the size of the dory, as to whether or not it would support it, and to the strength of the board?

(Testimony of Lieutenant John Hay Fletcher)

A In this particular case, the weight of the dory, and the construction of the board, it would not support it.

Q You would not call a light skiff that they carry to go ashore from this kind of boat, a dory?

A A dory is a particular construction of boat.

Q Are you familiar with the boats of this class used on the Columbia River and in Alaska and on Puget Sound?

A The boats of which class?

Q The boats of the class of the V-293.

A Yes, I am familiar with the boats of that class, having served on the Columbia River and also on Puget Sound and also in Alaska.

Q And you never saw a skid board used for that purpose?

A No, sir.

Q How long since you have been in that particular section?

A Which particular section?

Q The Columbia River?

A The Columbia River, three years ago.

MR YAKEY: I think that is all.

REDIRECT EXAMINATION

BY MR CHICHESTER:

Q Have you ever seen this chart before?

A I have.

Q I will ask you when did you first see it, or rather, are these your initials that you put on the chart yesterday?

A They are.

(Testimony of Lieutenant John Hay Fletcher)

Q Where did you see that chart, and where was it located at the time?

A On the V-293.

Q Who was present at the time it was found?

A Yourself and the United States Deputy Marshal.

Q There are some figures, 246 and 15 under them and a line with 231. Do those figures mean anything to you with respect to that chart?

A To me they would refer to the calculations of a course to be steered in that the variation of this chart is 15°.

Q Will you step to the chart and indicate the direction that that course would be, assuming, of course, that the course begins at the point marked Number 1 in red pencil?

A (Witness at chart on blackboard). A true course of 246 would be this course here; (Indicating) transposing it would bring it northwest off of Catalina Island; that is the true course. To get the compass course from the true course, the variation is subtracted in this case, which would make it a magnetic course of 231°.

Q What would that course be?

A That would be the same as the true course; that would be the course the boat would have to steer by their magnetic compass.

THE COURT: That would be the course for San Clemente Island?

A It would be the course to the northwest end of Santa Catalina Island. San Clemente is to the south of Catalina.

Q BY MR CHICHESTER: This point marked Number 2 on the chart?

(Testimony of Lieutenant John Hay Fletcher)

A Yes.

Q BY THE COURT: In other words, the course indicated by those figures would not be a direct course for San Clemente Island?

A No, they would have to go either to the north or the south of Santa Catalina, because Clemente is to the southern. They would have to go either one or the other. There is no direct course to Santa Cruz or San Clemente. Catalina Island interferes.

Q What the Court had in mind is this: the course indicated by those figures which you have just delineated on this chart, would that be the course that a boat would normally take if it were headed for San Clemente Island?

A Yes, sir. I will amend that.

Q. What is that?

A I would like to amend that answer. That would be the most probable course in that it would be shorter to reach the northwest harbor of San Clemente. That is the only point of habitation.

Q And the course normally followed if the boat were headed for Santa Cruz Island?

A It would not, sir. It is about 90°opposite—about 70° opposite.

Q What is?

A The course that would take the boat to Santa Cruz Island and the one that those figures would represent.

THE COURT: Proceed.

MR CHICHESTER: That is all.

(Testimony of Thomas Noland)

RECROSS EXAMINATION

BY MR YAKEY:

Q In regard to the construction of this chute, as you call it, on the stern of the V-293-, was there any roller?

A There is a roller on the stern of the V-293, but no roller on this chute.

Q Where was the roller? That roller was similar to rollers on other fishing boats?

A Yes, sir, some fishing boats have rollers on the stern for launching dories.

Q You made a list, you say, of the goods found aboard the V-293 at the time when she came in to the Base?

A Not a complete inventory.

Q Did you see a list or was a list shown to you by Captain Hogstrom purporting to be a list of what he had purchased?

A No, sir, he had no list to show.

MR YAKEY: That is all.

MR CHICHESTER: That is all. At this time I offer the chart in evidence.

THE COURT: It has already been marked as Government's Exhibit Number 8.

THOMAS NOLAND,

called as a witness on behalf of the Government, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR CHICHESTER:

Q What is your business or occupation?

A Boatswain, U. S. Coast Guard.

(Testimony of Thomas Noland)

Q How long have you been so employed?

A 6 years.

Q Have you ever had occasion in the course of your employment as boatswain, United States Coast Guard, to come in contact or to see the British vessel "Algie"?

A Yes.

Q When was that?

A On March 1, 1932.

Q Where did you see the vessel?

A Alongside of the Norwegian ship "Niederard".

Q Where was that?

A It was off San Isidro Point, Mexico.

Q Where was that point?

A It was off Mexico, about 9 miles west of that point. (Indicating on chart).

Q What was taking place at that time?

A She was loading.

Q Loading what?

A She was taking a load of packages, burlap packages.

Q Have you ever seen such burlap packages before?

A Yes, sir.

Q Based upon your experience in the United States Coast Guard and your contact with similar burlap packages on former occasions, would you state what in your opinion those packages contained?

MR YAKEY: I cannot see where this is material to any issue involved in this case.

MR CHICHESTER: I am doing this to connect it with Exhibit Number 1 for identification, just offered for identification, to connect the contents of that letter with

(Testimony of Thomas Noland)

the testimony of the witness for the purpose of showing that this "Algie" is a British Rum vessel.

MR YAKEY: What has the "Algie" to do with the issues involved in this case?

MR CHICHESTER: The letter contains a list of foodstuffs, a comparable list of which was found aboard the V-293, showing the probable destination of the foodstuffs aboard the V-293, and the time the "Algie" was seen in the Mexican waters and the time it was next seen in Mexican waters.

Q BY THE COURT: You say you saw this British vessel on March 1, 1932, about 9 miles west of San Isidro Point, Mexico?

A Yes, sir.

Q At that time articles were being loaded onto the British vessel or taken from it?

A They were being loaded onto it; they were taken from the Norwegian Motorship "Niederard".

Q And the articles that you saw being loaded at that time on the British vessel, you say were wrapped in burlap?

A Burlap packages.

Q How frequently have you seen packages similarly wrapped, say, in the last 5 or 6 years that you have been in the service?

A Well, the last 2 years I have had the job of picketing those ships down there, the last year and a half, and they are continuously loading down there.

Q They are continuously loading packages wrapped in burlap similar to what you saw being loaded on this British vessel?

(Testimony of Thomas Noland)

A Yes, sir.

Q And these packages that you have frequently seen wrapped in that manner, to your knowledge, have contained what?

A Contained liquor.

Q BY MR CHICHESTER: And did you see the "Algie" on any subsequent date from March 1st in those waters or in any other waters?

A No, that is the only time I ever saw her.

Q You saw her down there alongside the "Niederard" taking apparently what was this liquor?

A Yes, March 1st.

MR CHICHESTER: I believe that is all.

MR YAKEY: I move to strike out all testimony in regard to the "Algie" as not material in this case, as not relevant to any issue involved here.

Q BY THE COURT: Where is the place where you saw the "Algie" with reference to San Clemente Island?

A It would be, roughly, about 150 miles southeast of there.

MR YAKEY: I cannot see, your Honor, how it has any bearing on the issues involved here.

THE COURT: We will reserve our ruling until the close of the case.

MR YAKEY: No cross examination.

Q BY MR CHICHESTER: How long, in your opinion, would it take for the "Algie", assuming it proceeded on northerly to reach the vicinity of San Clemente Island?

A It would take approximately 15 hours.

MR CHICHESTER: That is all.

(Testimony of Thomas Noland)

MR YAKEY: That is all.

MR CHICHESTER: At this time we renew our offer in evidence of the letter received in the ordinary course of business from the commander of the California Division of the United States Coast Guard directed to the commander of Section Base 17, referring to the British rum ship "Algie", to the list of foodstuffs which were to be transported from some shore boat, which was unknown, according to the letter. We believe that it is entirely material in connecting the contents of this letter with the vessel in this case.

THE COURT: May we see that letter and also Government's Exhibit Number 7?

(Counsel handing documents to Court).

THE COURT: May we inquire whether counsel has made comparisons between the items enumerated on the letter and the items enumerated on the list which one of the witnesses has heretofore identified?

MR CHICHESTER: Yes, sir, if your Honor please, we appreciate that they are not identical. We believe that they have some direct bearing, however, in that the type of foodstuffs is practically the same, and there is a particular reference to tobacco and fresh water on the list, all foodstuffs and materials which are ordinarily required in the staple articles of food, and though they do not match up directly, still, with the other circumstances, we believe that they are entirely material, because the boat from which the message was intercepted, the contents of which are contained in that letter, that is, the "Algie", at the time it was located in the Mexican waters and loading with liquor, and the third circumstance that they would

(Testimony of Earl Beach)

have approximated the location just off San Clemente Island on or about the 3rd of March, and the further fact that the foodstuffs in the V-293, the apparent type of rum boat, would be the type of food ordered and requested by them. The fact that it is identical I do not think is material, but I think the food was destined in that direction and referred to the "Algie".

THE COURT: It occurs to us that the Government was warranted in investigating the activities of the V-293 from the mere fact that it contained these supplies that are listed in Exhibit Number 7, irrespective of whether any such letter had been received from the Coast Guard Headquarters.

MR CHICHESTER: I think that is very probably correct. This other circumstance I felt was material in showing a probable connection. I think as far as the violation alleged in the libel is concerned, the supplies found aboard that vessel were sufficient to warrant an investigation and seizure.

THE COURT: We are inclined to think that the letter is not as yet shown to be directly connected up with this boat, the V-293. We are inclined to think the foundation is still lacking.

MR CHICHESTER: May we have an exception?

EARL BEACH,

called as a witness on behalf of the Government, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR CHICHESTER:

Q What is your business or occupation?

(Testimony of Earl Beach)

A Navigation clerk in the Customs House in San Diego.

Q How long have you been so employed?

A About a year and—very nearly two years down there.

THE COURT: What do you expect to prove by this witness?

MR CHICHESTER: The documentation of the vessel at the port of San Diego.

THE COURT: Why not make the statement that you wish to prove and see if counsel can not stipulate?

MR YAKEY: I think we can stipulate to that.

MR CHICHESTER: I would like to offer the application itself.

THE WITNESS: I have a copy of the application.

MR YAKEY: Yes, a copy of the application may go in if you want to put it in.

MR CHICHESTER: We offer the copy of the application in lieu of the original, together with the certificate of number award of V-293 in evidence as Government's Exhibit next in order.

THE COURT: It will be marked as Government's Exhibit Number 9.

(Government's Exhibit Number 9).

MR CHICHESTER: This one document is the official record of the Collector of Customs in San Diego, and they have requested that, with the consent of counsel, a copy may go into evidence in lieu of the original.

MR YAKEY: We have no objection.

THE COURT: Very well. The two together will be marked as Government's Exhibit Number 9.

(Testimony of Earl Beach)

Q BY MR CHICHESTER: Mr. Beach, based upon your experience in the seafaring trade and your contacts with fishing boats and the fishing fraternity, would you say that this vessel, the V-293, was or was not a vessel equipped for the industry of fishing?

MR YAKEY: He has not shown himself competent to testify as an expert.

THE COURT: Haven't there been other witnesses here who testified that this boat had no equipment for fishing?

MR CHICHESTER: Yes, sir, your Honor, but the only matter I intended to prove here was that the vessel was put on the suspected list.

THE COURT: It strikes us there is other testimony here along that line.

MR CHICHESTER: That is all.

THE COURT: That is all.

THE WITNESS: I would like to say that those are part of our records in the Customs House.

THE COURT: That is, you would like to take the original back?

THE WITNESS: Yes, sir, I would like to take it back as soon as I could.

MR CHICHESTER: We can make a copy and substitute it, your Honor.

MR. YAKEY: It is made out in the regular Customs House form.

MR CHICHESTER: I presume it will be better for the clerk to make a copy.

THE COURT: Very well, the clerk will make a copy during the noon recess.

(Testimony of Falon E. Kirk)

MR CHICHESTER: And return the original to Mr. Beach.

THE COURT: Yes, sir, you might get it this afternoon.

MR CHICHESTER: The Government rests.

THE COURT: May we inquire how many witnesses will be called upon the part of the defense.

MR YAKEY: About four.

THE COURT: Well, we will have another case that we would like to get started on this afternoon.

MR YAKEY: I think we ought to get through with it early. I do not know how much cross examination there will be.

THE COURT: Let us proceed until 12:30.

MR YAKEY: Very well.

DEFENSE

FALON E. KIRK,

called as a witness on behalf of the Claimants, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR YAKEY:

Q Where do you reside?

A Arcadia.

Q That is in Los Angeles County, California?

A Yes, sir.

Q Are you one of the claimants in the libel proceeding now in the course of trial?

A I am.

(Testimony of Falon E. Kirk)

Q Do you own the American Screw Motor Boat V-293?

A I do.

Q Are you the owner of that boat?

A I am.

Q Where was she built?

A San Diego.

Q When?

A Well, around about March of last year.

Q March of 1931?

A Yes.

Q Was she completed at that time?

A I do not recall the exact date when she was completed. I had it in mind, but now I have forgotten it.

Q Who constructed the boat for you; who built it for you?

A The Kittenberg Boat Works at San Diego.

Q Has anybody else got any interest in that boat?

A None that I know of.

Q After she was constructed what did you do with her? Did you charter the boat then to Captain Hogstrom?

A I did.

Q Did you ever operate the boat yourself?

A No.

Q Is there any encumbrance or mortgage on this boat?

A Not that I know of.

Q Not that you have put there?

(Testimony of Falon E. Kirk)

A No, sir.

Q I show you a document here. (Handing document to witness). That is your charter contract with Captain Hogstrom, isn't it?

A That is it.

MR YAKEY: Do you want to see it?

MR CHICHESTER: Do you intend to offer it in evidence?

MR YAKEY: Yes.

MR CHICHESTER: No objection.

THE COURT: The same is offered in evidence?

MR YAKEY: Yes, your Honor.

THE COURT: It will be marked Respondent's Exhibit B.

(Respondent's Exhibit B).

MR YAKEY: It is the contract under which Captain Hogstrom was operating the boat.

Q BY MR YAKEY: What was that boat built for?

A Well, it was built primarily for fishing.

Q Had you ever had any experience yourself in fishing?

A Well, other than just once in a while in the summer going for about three weeks, and in the northern part of the state I used to go out there quite a bit.

Q What did that boat cost you?

A Well, not to be exact, I would say around $4,500.

Q And who has been operating her since she was built?

A Eric Hogstrom.

Q You made an application for the award of a local identification number?

(Testimony of Falon E. Kirk)

A Yes, sir.

Q And that was the date of October 14, 1931?

A Approximately then, I believe, to the best of my memory.

Q And on that application you gave the principal occupation as that of fishing?

A Yes, I think we had to specify something, and we specified the principal occupation of fishing.

MR YAKEY: You may cross examine.

CROSS EXAMINATION

BY MR CHICHESTER:

Q What is your business or occupation?

A Well, service station, garage and so forth, any phase of the automobile business.

Q Are you qualified as a mechanic?

A Well, some people think so.

Q Where is your place of business located?

A Right at present it is in San Gabriel.

Q How old are you?

A I am about 37.

Q How long have you been employed in San Gabriel?

A It is my own business.

Q Where is Arcadia from your place of business?

A I would say 2½ miles east.

Q And you go out from San Gabriel to your place of business?

A That is the idea.

Q How long have you been conducting the business at San Gabriel?

A I just got it started around the first of the year.

Q Around the first of 1932?

(Testimony of Falon E. Kirk)

A Yes, sir.

Q What were you doing before that time?

A I was conducting another business in Arcadia of the same nature.

Q Whose business was that?

A My partner and mine.

Q Who was your partner?

A Mr. Howard.

Q What is his full name?

A Walter W.

Q Where is he now?

A He is in San Gabriel.

Q He is in San Gabriel now?

A Yes, sir.

Q How much of this business did you own in Arcadia with Mr. Howard?

A Half.

Q How much was the business worth, just approximately?

A I would say, if you were to sell the business and could find a buyer, we valued it about $4,800, but really for the money expended and not taking into consideration the depreciation, I would say the business would run around $8,000 or $9,000.

Q How long did you operate that business?

A We operated in that location for about, I would say, 6 years.

Q And prior to that time what did you do?

A The same thing.

Q Where?

A In Arcadia.

(Testimony of Falon E. Kirk)

Q Your old business?

A Yes, sir.

Q You have always been working for yourself, is that it?

A Not always, no.

Q Well, prior to this business of 6 years standing in Arcadia, you were working for yourself in Arcadia?

A Yes, sir.

Q In similar work?

A Yes.

Q All mechanical work?

A All mechanical work.

Q How long were you in that business that time?

A That was about 3 years and a half.

Q How far through school did you go?

A Well, I never finished the public school; I went to private school.

Q Did you go through high school?

A No, I never went to public school or high school; I went to private school.

Q What age were you when you finished going to school?

A Well, I would say definitely when I gave up getting any education I was around 25.

Q Did you ever have occasion to go to sea?

A Why, yes.

Q When?

A Like going fishing, if you call that going to sea; that has been my occasion.

Q I mean, going to sea; have you ever worked as a seaman?

(Testimony of Falon E. Kirk)

A No.

Q And when you refer to going fishing, you mean going on an occasional fishing trip?

A Yes, sir, and up north my brother had a boat, and we used to go fishing up there.

Q Where was that?

A Up in Eureka.

Q Aside from that you have never owned a boat?

A Yes, sir.

Q You bought this boat alone?

A Yes, sir.

Q You bought it from the Kittenberg Boat Works?

A Yes, sir, I ordered it built.

Q They are located at Point Loma, California?

A Yes, sir.

Q Why did you have it built there?

A I heard that they were responsible boat builders.

Q From whom did you hear it?

A From Eric and several people.

Q And you had known Mr. Hogstrom prior to the building of this boat?

A Yes, sir.

Q How long had you known him?

A I would say in the neighborhood of 5 to 7 years.

Q Had it been agreed prior to the building of the boat that you would build it, and he would charter it?

A That was the idea.

Q You were to finance the boat?

A Yes, sir.

Q Did you have any purpose in mind for financing the boat for Mr. Hogstrom on a charter?

(Testimony of Falon E. Kirk)

A For the same reason that anyone would have.

Q Did you have any particular reason in mind?

A Yes.

Q For what?

A To make money.

Q How much did the charter call for?

A $300 a month.

Q Did he ever pay you any rental for the use of this boat?

A No.

Q At no time? From October up until March he never paid you anything for the use of that boat, did he?

A No, he was never able to.

Q As a matter of fact you had the boat chartered for fishing?

A Yes, sir.

Q And you knew it could not be used for any other business?

A No, I did not know that. I did not understand it that way, anyhow.

Q Why did you have it chartered for fishing?

A I understood it had to be chartered for something, and fishing would be one of the things that would predominate under given circumstances.

Q What do you mean, "given circumstances"?

A If fishing was good.

Q You did not know that it was at the time this boat was obtained?

A No, but I knew that the market was no good.

Q And you never owned a boat prior to this time?

A No.

(Testimony of Falon E. Kirk)

Q Where did you get the money to pay for this $4,500 construction bill?

A Well, there was mostly my money and partly my wife's.

Q Where did you get the money?

A I made it during the course of business while I was in business.

Q And the balance you obtained from your wife?

A Yes, sir.

Q Did you ever see a fishing boat before?

A I saw several of them.

Q Were any of them ever constructed like this boat?

A Well, I can't say as to that, whether they were or not. They are all similar.

Q Did you ever see a fishing boat constructed similar to the V-293?

A Well, I was out on one last summer that I would say was constructed similar.

Q Do you know what the name of that boat was?

A No, I cannot recall.

Q Do you know where it was you were out in it?

A Yes, sir, off of Formosa.

Q Why did you have a 300 horsepower motor put in this boat?

A Well, speed was one of the features we wanted.

Q For fishing?

A Yes, sir, one of them.

Q What is the necssity of having a speed boat for fishing?

A It wasn't a speed boat necessarily, I don't think.

(Testimony of Falon E. Kirk)

Q A 300 horsepower motor will propel that boat through the water in excess of 20 knots an hour?

A I could not say as to that.

Q Did you ever have it tried out?

A Yes.

Q Where

A After it was finished and up at Pedro.

Q Why did you have it numbered in San Diego?

A Because it was closer to where the boat was built. We were down there quite a bit, and you might say, to kill two birds with one stone we had it numbered there.

Q. And you immediately brought it up to San Pedro?

A Yes.

Q And it was never returned to San Diego?

A No.

Q You have never operated the boat?

A No.

Q Do you know how to operate it?

A If she has a motor in it, I can make it run.

Q I am asking you if you can run it.

A The proof of the pudding is in the eating of it, and I think I could run it.

Q Do you know anything about navigation?

A No, not very much.

Q You refer to "we" in your testimony. You stated that "we" had to specify something, with respect to these documents, and so "we" said fishing. To whom do you refer?

A Let me have that question again.

Q You say "we" had to specify something, with respect to this document. Who was the other party?

(Testimony of Falon E. Kirk)

A Hogstrom and myself.

Q You were working together on this enterprise?

A Surely.

Q And did you require any bond or any security from Mr. Hogstrom when you entered into the charter party with him?

A I did not think I would have to have much consideration at first, but looking at it from a business angle I was forced to do that.

Q Where is that bond?

A I believe it is there.

Q You did enter into such an agreement in the form of a bond?

A Yes, sir.

Q Do you have that bond?

(Mr. Yakey handing document to Mr. Chichester).

Q BY MR. CHICHESTER: This appears to be a note dated October 30, 1931. By the way, this was not made out at the time of the charter. This was made out subsequently and dated October 30, 1931, and signed by O. E. Hogstrom, I believe it was, and this note was given to you for $4,000, a demand note. What was the purpose of this note?

A To protect my interest in the boat.

Q At the time did he have $4,000?

A No, but at the time I understood he had collateral or something that was worth that much. When you put your name on a note it is legal.

Q What collateral did he have?

A I would say a house.

Q Do you know, not what you think?

(Testimony of Falon E. Kirk)

A Yes.

Q What house did he have?

A He had a house on a double lot in San Pedro.

Q Free of any encumbrances?

A I think it was, but I guess it was not at the time.

Q Who insured this boat?

A I have forgotten the name.

Q It was insured?

A It seems to me it was.

Q Do you recall that definitely?

A Let me see—I don't think there was any insurance on it. There should not be, no, unless Eric took it out.

Q This was your boat in which you invested $4,500?

A There was no insurance on the boat.

Q Did you ever try to get it insured?

A No, not to my knowledge.

Q Do you know whether Mr. Hogstrom ever did?

A I doubt it.

Q As a matter of fact, no marine or insurance company will carry insurance on a boat of this type, will it?

A I don't know.

Q The charter party says that no insurance on the hull or machinery will be carried by either the owner or the charterer, and you would specify that in lieu of insurance a note of $4,000 will be deposited, said note to be collectable in the case of total loss of the vessel or in the case of any violation of any condition herein stated, which would prejudice the owner's interest, in an equal amount to the stated value of the vessel. That was your idea of the substitute for insurance. Hence, there would have to be a total loss of that vessel before you could collect anything on that note?

(Testimony of Falon E. Kirk)

MR. YAKEY: We object to that. The instrument speaks for itself.

THE COURT: Yes.

Q BY MR. CHICHESTER: There was no insurance for any damage to any other vessel by your boat?

A I understood that the charter protected me in the case of that.

Q Did you seek any legal advice before you entered into that charter agreement?

A None other than what you might say as you would go to a person in the habit of drawing up such papers and leave it to them to draw it up.

Q Who drew it up?

A I can't think of his name.

Q Was he an attorney?

A I cannot remember his name.

Q Was he an attorney?

A I imagine he was.

Q Well, do you know?

A Yes, sir, he was an attorney.

Q Where was he?

A In San Pedro.

Q Do you know his name?

A Only having seen the man once, I do not believe I can recall his name.

Q And you entered into a charter agreement, had a boat built involving $4,500 with no insurance and no further protection on your investment other than what was contained in that charter agreement, is that correct?

A Possibly.

Q Did you ever see the boat after you chartered it to Hogstrom?

(Testimony of Falon E. Kirk)

A Several times.

Q Did you ever see any fishing tackle on it?

A Yes.

Q What kind?

A Fishing tackle and poles.

Q Any lines?

A Yes.

Q What kind of lines.

A Well, just the kind like I had myself.

Q Did you ever do any fishing on it?

A Yes.

Q Where?

A Around in San Pedro, in the harbor around there

Q When did you do that fishing?

A Around vacation time last summer.

Q What did you ever catch?

A Mostly barracuda.

Q Did you ever catch fish in commercial quantities?

A I don't know; I never went out commercially.

Q Do you know whether or not Mr. Hogstrom ever did?

A Evidently he did not.

Q BY THE COURT: You mean he told you he did not?

A He told me he went fishing several times, but that the market was wrong, and so forth, and it made it a financial impossibility to do anything with it.

Q You mean that he caught fish?

A That, I could not say. I see what you mean, but I don't know whether he went fishing or not. I just assumed that.

(Testimony of Falon E. Kirk)

Q Just what did he tell you about what he did do?

A Well, that the market was not good for fishing, and he thought it would be inadvisable to do fishing with the boat at the present.

Q When did he tell you that?

A Very shortly after the boat was put in commission.

Q You mean about last October?

A Around about then, I should imagine.

Q And do you mean about October or November of last year he told you that on account of the market conditions he thought it was inadvisable to take the boat out for fishing?

A Yes, sir.

Q How frequently did you see him between October and February?

A Why, we would see each other once or twice, possibly. I could not say definitely. You might say that we were at the opposite ends of the world, because in my business I am held very tight to my business.

Q How long before the boat was seized did you last see Hogstrom?

A I think it was about 15 or 20 days, I would say, along in there, or maybe a little longer, possibly.

Q Where did you see him?

A I saw him down at San Pedro.

Q Was he on the boat?

A No, it was at his house, and then we went out and took a ride on the boat, and I looked the boat over to see if everything was jake.

Q What did you see on the boat at that time?

(Testimony of Falon E. Kirk)

A It was clean. There was nothing on it. It was laid up.

Q Do you mean there was no fishing tackle?

A No, they were having trouble with the motor or something.

Q What, if anything, did he tell you about using the boat to catch fish in commercial quantities?

A He said he thought he might as well give up the idea and see if he couldn't get other work with it.

Q Did you ask him about paying the rental?

A Yes, sir, I asked him about that, but it was just like you could see, that it was no use in annoying the man; he could not pay up.

Q Did he tell you he could not pay the rent?

A He said it was impossible, but that he expected to get work so that he could pay the rental.

Q Did he tell you he had been unable to earn any money by going out to catch fish?

A Not in so many words, but he said in view of the way the market was it was an impossibility to make any money, that there was no use in wasting money in trying to make money when there was no market for it.

Q You mean 15 or 20 days before the boat was seized he paid you no rental?

A No rental.

Q And he told you there was no use in taking the boat out for fishing purposes?

A Practically that.

THE COURT: Any other questions?

(Testimony of Falon E. Kirk)

Q BY MR. CHICHESTER: Did you ever see any fishing equipment he had provided for that boat for commercial fishing purposes?

A Yes, sir, I believe I have, at his house.

Q What kind of equipment was it?

A It seemed to me it was more or less tackle as you would call it.

Q What kind of tackle?

A I would say it was lines with about Number 2 or 3 hooks on them, you know, out on a trolling line.

Q Any nets?

A There was always nets and cork floats around the house where he was.

Q Do you know whether those nets were used on the boat?

A No.

Q Did Mr. Hogstrom ever tell you he had used the boat for commercial fishing?

A I can't directly say that he did.

Q Do you ever remember meeting Mr. McFarland?

A Yes.

Q When was that?

A That was last month.

Q Where was it?

A Out at my place of business.

Q Who was present at that time?

A Myself and partner and Mr. McFarland.

Q Who is your partner out there?

A Mr. Howard.

Q He is now your partner as well?

A He is.

(Testimony of Falon E. Kirk)

Q Did he ask you any questions?

A Yes.

Q What did you answer?

A I told him I had received notice in the mail and through a change in address I just got the notice that the boat had been seized a day previous to that, and that I had not had a chance to make contact with Mr. Hogstrom or anything pertaining to the boat and did not know what it was all about.

Q Did you refuse to make any statement at that time?

A I refused to make a statement, because I did not know—

Q (Interrupting) Did you make a statement that that boat was in a jam, and you were going to make no statement concerning it until you saw Mr. Hogstrom?

A No.

Q Are you positive of that?

A If I did, I did not express it that way.

Q Why did you hesitate about making any statement; if this boat was a legitimate boat to be used in the fishing business, why did you hesitate?

A For the simple reason it would be caution upon any man's part. Why should I go to work and make a statement first without knowing anything about it?

Q Did you have any reason to believe there was anything wrong in the operation of this boat?

A I cannot say that I did.

Q Did you or did you not?

A No, not up to that time.

Q Yet, you were taking a caution against something?

(Testimony of Falon E. Kirk)

A Surely.

Q What was that something?

A I wanted to find out exactly what the charge was. He could very easily tell me one thing, and it could be another thing. I did not know that—

Q (Interrupting) Was there anything for you to conceal?

A Nothing that I know of.

Q Why should you want to refuse to say anything about the boat?

A I did not refuse. I told him I owned the boat; that is what he wanted to know.

Q But you just testified that—

A (Interrupting) He had a stenographer with him, and he wanted to take a sworn statement as to my ownership of the boat.

Q And you refused to give any statement at all?

A No, I did not refuse to give any statement.

Q What did you say?

A I told him I owned the boat.

Q That was all you said.

A No, I think there was a lot of other conversation at the time.

Q With respect to the boat?

A Yes.

Q Do you recall it?

A Not all of it.

Q Well, what was some of it?

A He said he thought the boat was not what it was supposed to be, and so forth.

Q What did you say as to that?

(Testimony of Falon E. Kirk)

A I told him that although I could not swear to it, I thought it was.

Q That it was what?

A What it was supposed to be.

Q What was it supposed to be?

A A fishing boat.

Q BY THE COURT: With whom did you say you had this conversation?

A With Mr. McFarland.

MR. CHICHESTER: He is a Special Customs Agent.

Q BY MR. CHICHESTER: Do you recall the construction of the rear end of this boat with the slide board and the other slides built next to it?

A I do.

Q You had this boat built, I believe you stated, with the Kittenberg Boat Works?

A I did.

Q Did you call for that type of construction on the rear end?

A No, I was more guided by the shipbuilder and Mr. Eric.

Q And Mr. Eric Hogstrom?

A Yes.

Q They gave you that idea?

A Yes.

Q Why did they suggest that type of construction?

A Because it was easier for a dory to get on and off and other things.

Q You used that slide to slide a dory on and off the boat?

A I suppose so.

(Testimony of Falon E. Kirk)

Q Do you remember the construction of the wood there of that slide?

A As I remember that, it was fairly heavy wood.

Q How heavy?

A I suppose an inch plank or something along in there.

Q Have you ever seen it?

A Yes.

Q Did you ever see a boat sliding on or off of that slide board?

A No, I never did.

Q You never saw that?

A No.

Q There are certain stanchions which hold the dory in place?

A Yes.

Q And there is a roller over the end of the boat?

A Yes.

Q Then, why would they want the slide board there if they were going to hold the dory up in these stanchions?

A I don't know.

MR. CHICHESTER: I believe that is all.

REDIRECT EXAMINATION

BY MR. YAKEY:

Q You never have had any experience in drawing these charter party contracts; you had never drawn a contract or had a contract drawn for chartering a boat before this contract was drawn?

A No.

Q Who was this party, a Customs House Broker?

A I believe that is what they call him.

(Testimony of Falon E. Kirk)

Q Where?

A At San Pedro.

Q And you had him to draw it?

A Yes.

Q And so far as the wording in that contract was concerned, the wording was put in there by the man who drew the contract?

A That was it.

Q You had known Mr. Hogstrom for some years?

A I have.

Q And you accepted in lieu of any bond his promissory note so that in case there was a loss of the boat that the note would be paid? At whose suggestion was that taken?

A That was just a kind of an idea on my part.

Q You thought that that would give you ample security?

A Yes.

Q Mr. Hogstrom had some property which you knew of?

A Yes.

Q And you felt that you were secure?

A Yes.

Q A man by the name of Wickersham drew that contract for you and Mr. Hogstrom?

A I don't really remember the name so much.

Q At the time that you were interviewed by Mr. McFarland you told him you owned the boat?

A I did.

Q And he wanted you to make a sworn statement?

A Yes.

(Testimony of Falon E. Kirk)

Q Did you give him any reason for not making it at that time?

A Yes, I did.

Q What did you tell him?

A I told him I just got a letter through the mail telling me that the boat had been confiscated, or whatever you call it, and I didn't know enough about the case then to give him a sworn statement.

Q Had you consulted any attorney up to that time?

A No.

Q Or any counsel of any kind?

A No.

Q The boat after it was constructed and taken over by Captain Hogstrom under the charter was not in very good condition so far as its motors were concerned?

A No, the motor was a lemon.

Q It never did operate very well?

A Well, it had its moments.

Q And you knew, and Captain Hogstrom told you, did he not, that he had an opportunity to do some work for the moving picture people at different times, and he thought it would be better to put it in that kind of service than to do fishing?

A Yes, sir, I was very much in favor of that.

Q In your application for award of a local identification number you gave as the principal occupation of the boat, for fishing. Did you understand at that time that it would be limited, that you would not be allowed to do anything with it except to fish?

MR. CHICHESTER: That is objected to as immaterial. A man is presumed to know the law. The law

(Testimony of Falon E. Kirk)

is conclusive, and the purposes for which a boat may be licensed or documented are well defined, and anyone who has an investment of this amount should take care of it by finding out what he can or what he cannot have the boat licensed for.

THE COURT: Well, we will let him answer it.

A What was the question?

(Question read by the reporter.)

A No, I did not understand that. I did not understand that you would not be allowed to do anything except fishing.

Q BY MR. YAKEY: As a matter of fact, you knew that the boat did do a little work for the Paramount Picture people, a day or two at a time?

A Yes, I did.

MR. YAKEY: That is all.

RECROSS EXAMINATION

BY MR. CHICHESTER:

Q When you purchased that boat from the Kittenberg Boat Works, did you pay for it in cash?

A No, I did not pay them cash in full; it was paid as the boat was constructed.

Q Who paid?

A I did.

Q By what means; did you use checks or cash?

A Some checks and some cash.

Q Have you anv of those cancelled checks?

A No. I do not believe they will show as cancelled checks. They were cashiers' checks.

Q And the balance was paid in cash?

A Some cash sometimes.

(Testimony of Falon E. Kirk)

Q What was the amount of the final payment?

A It seems to me it was around $900.

Q Do you recall what the other payments were?

A They would vary so much that I could not specify just what they would be.

Q How long did they take to build the boat?

A It seems to me it took along about a couple of months.

Q That was started in March of 1931? A What is that?

Q That would make it around June or July when it was completed?

A Along in there.

Q And you did not obtain any kind of a license until October of 1931, did you?

A I am not clear on the dates, to be frank with you.

Q What did you do in the meantime, between the date of the completion of the boat and the date you obtained a license?

A As I recall it, the license was obtained before the boat was completed. It was practically completed, you know. It all came along about the same time. My memory for dates is very poor.

Q The date of the licensing of the vessel is the 14th of October of 1931?

A Yes.

Q I believe you testified that it was built, that the building was started in March of 1931, didn't you?

A I believe it was.

(Testimony of Falon E. Kirk)

Q If they took a month to build it, certainly something was done with the boat between March and April or May, 1931, and the date it was completed.

A Well, the license was taken out before it was finally completed. It was all ready for inspection. It seems it has to have an inspection before it can be turned loose, and to get that license you have to have the boat approximately finished.

Q Then, it took from March until October to build that boat?

A There was a great deal of trouble with the motor.

MR. CHICHESTER: That is all.

REDIRECT EXAMINATION

BY MR. YAKEY:

Q The fact of the matter is the motor had to be rebuilt?

A It did.

Q It had to be rebuilt here and then sent down and put in?

A Yes.

Q When you say it took you two months or three months to build the boat, you meant the building of the hull?

A Surely.

Q And the machinery wasn't put in, was it, so that it would work and stand inspection, so that you could get your award of identification number until the time it was issued in October?

A Yes, that was it.

MR. YAKEY: That is all.

MR. CHICHESTER: That is all.

THE COURT: Recess until 2 o'clock.

(Whereupon a recess was taken until the hour of 2:00 o'clock P. M. of the Same day.)

(Testimony of Eric Hogstrom)

LOS ANGELES, CALIFORNIA, MONDAY, MAY 16, 1932.
2:00 O'clock P. M.

THE COURT: Proceed with the case on trial.

MR. YAKEY: I will call Mr. Hogstrom.

ERIC HOGSTROM,

called as a witness on behalf of the claimants, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. YAKEY:

Q You are one of the respondents or the claimants in this case?

A Yes, sir.

Q And you remember the boat on the date it was seized; that is, you remember the occasion?

A The 3rd of March.

Q And at that time were you in charge of the boat?

A Yes, sir.

Q How long had you been in charge of the boat prior to that time?

A Since she was built.

Q And you had it under charter from the owner, Mr. Kirk?

A Yes, sir.

Q He is the other respondent in this case?

A Yes, sir.

Q Do you remember where the boat was built?

A She was built down in San Diego at Kittenberg's Boat Works.

(Testimony of Eric Hogstrom)

Q For what purpose was she built?

A Well, for fishing and moving picture work, but principally for fishing, but if the fishing wasn't any good, I could go to work with it for moving picture work, party boat, and sport fishermen.

Q Did you do any fishing with her?

A Well, I tried to, but I couldn't get any fish.

Q When did you take charge of the boat?

A I took charge of the boat when she was finished in October, I think it was.

Q Did you have any trouble with the boat, that is, with her machinery after receiving charge of it?

A Yes, sir, we had considerable trouble with the motor.

Q She wasn't in good condition to operate normally?

A No, she wasn't.

Q On the day on which this boat was seized, where were you bound?

A I was bound for Santa Cruz Island.

Q Who was with you?

A A fellow by the name of Johnston.

Q Where were you going, to what part of Santa Cruz Island?

A I was going to Couches—canyon of the pigs, in English.

Q What is located there?

A A man and wife who have been fishing there for the last, I would say, about 9 years now.

Q What is their name?

A Mr. and Mrs. Englund.

Q Have you been there before?

(Testimony of Eric Hogstrom)

A Several times.

Q Were you on friendly relations with the Englund family?

A Yes, sir.

Q And on the day in question what did you have, or have you a list of what you had on board the boat in the way of food and provisions?

A I have.

Q Have you got that with you?

MR. CHICHESTER: I don't know whether there is any question concerning this list and the list in evidence. Has counsel inspected the other list? If so, I have no objection to it.

MR. YAKEY: I think it would be proper to admit it, if his testimony is that this is what he had.

THE COURT: You may proceed.

(Counsel handing document to witness.)

THE WITNESS: Correct.

Q BY MR. YAKEY: Is that the list?

A That is the one.

Q Does that contain a full list of all the food and provisions that you had on the boat at that time?

A Everything.

Q When was this purchased?

A The day before I went out I called up an order the night before I went out.

Q And the bill was purchased at the market named on the bill?

A Yes, and that is the prices.

Q And the price paid for it is correctly marked on the bill?

(Testimony of Eric Hogstrom)

A Yes.

MR. YAKEY: We offer this in evidence, your Honor, as a part of the testimony of the claimants.

MR. CHICHESTER: No objection.

THE COURT: The same will be marked Respondents' Exhibit C.

(Respondents' Exhibit C).

Q BY MR. YAKEY: In addition to that, you had some water on the boat?

A Yes, sir.

Q How many gallons?

A 50 gallons.

Q Did this boat have any fresh water on board?

A No, no fresh water tanks.

Q And the water you had on board was for what purpose?

A Some for my own purpose and some for the people on the island. I usually take some fresh water over there to them, because the water there is a kind of brackish; you can't wash your hair in it; you can't cook beans or peas in it, so I was bringing some to them.

Q When you say "the people on the island" you mean the family of Englunds?

A Yes, sir.

Q And your going to the island was for what purpose?

A Just to go over there to do a little hunting, a little vacation; I wasn't working.

Q Where were you to stop when you went there?

A I stopped in the camp.

Q And that is the Englund camp?

A Yes, sir.

(Testimony of Eric Hogstrom)

Q For what purpose were you taking these provisions that were aboard the boat?

A Well, you see, whenever I go over there I usually take some groceries with me. When the crawfish season is over—because they only have to depend on boats coming over there out of season. There is no communication at all between the island where they are and the mainland, so it is customary for any boat that goes over there to take fresh water and a little provisions with them and just give them to them as an accommodation.

Q Those provisions that you were taking were to be for your own and your companion's consumption and the consumption of the family that was there that you were visiting, is that correct?

A Yes, sir.

Q They were taken over there to be used while you were there, and what was to be done with the remainder? They were to be given to the Englund family?

A Yes.

Q And any charges made to them for the goods?

A Nothing.

Q Any charges made for carrying the goods there?

A Not a thing.

Q How long did you contemplate at that time remaining there?

A Oh, about 10 or 12 days.

Q And during that time the provisions that you were taking were to be used for the sustenance of yourself and the Englund people and whoever might happen to be there?

(Testimony of Eric Hogstrom)

A Yes, sir, it is customary to do that. There is a camp about 8 miles above, and there is another camp approximately 5 miles below, and they often visit each other, and when they do, they eat together.

Q There is no regular line of boats running between the mainland and Santa Cruz Island?

A No regular lines.

Q During the fishing season up there, that is during what month?

A The fishing season is from the 1st of April to the 15th of October, that is, the lobster fishing.

Q At that time and at the time that you went there the lobster fishing season was not on, was it, at the time your boat was seized?

A No, sir.

Q And during the time that the fishing season is on how are supplies obtained by the people on the island?

A Well, they have a tender, a man in the fishing market in Santa Barbara, the Largo Fishing Company who have leased the island from Mr. Kerr, who owned the island, and the fishermen have camps around the island, five or six fishing for him, so they have to sell the fish to him, and when they go out and get the fish in they usually bring groceries that the campers order once a week.

Q During the closed season, how do the people get their groceries over there?

A Mrs. Englund usually goes into Santa Barbara when there is a boat in the harbor there, goes in with it, and brings out the groceries; no set time; they do not

(Testimony of Eric Hogstrom)

know when the boat is going to come there; just take chances on a boat coming in.

Q How long have you been familiar with Santa Cruz Island and the manner of doing business there?

A I fished on the island six years ago the first time and about two and a half to three years the second time. The first time I fished on Santa Cruz at Yellow Banks, and the second time I fished on the Capa for Mr. Largo.

Q Are you familiar with the custom and manner in which the people get their provisions there during the closed season; in other words, is it not the custom that anybody going there, the people that live on the island if they want anything in the way of provisions that are not there, that anybody that is going to the mainland will get them and take them over to them simply as a neighborly or friendly act and no charges are made by anybody for doing that?

A Any fishing boat going over there always brings groceries as an accommodation for the people on the island.

Q At the time you took these there was no expectation or contract whereby you would receive anything for your services at all?

A None whatever.

Q With regard to the water tanks for the boat, it had none on it?

A No, no water tanks.

Q What would be the capacity of the ordinary water tank for a boat of that size?

A Oh, 50 or 60 gallons.

(Testimony of Eric Hogstrom)

Q I will show you Respondents' Exhibit A and ask you if you have ever seen that letter before? (Handing document to witness).

A Yes.

Q And when did you receive it? First, did you receive that letter?

A My wife received it. She always writes in her name. She always addresses her mail to my wife.

Q When was that received, about the date on the letter?

A Oh, a couple or three days before they seized the boat, I think.

Q Before the boat was seized?

A Yes.

Q Had you ever received any other letters from Mrs. Englund?

A Oh, yes, we received scores of letters.

Q In other words, was there a regular correspondence between your wife and Mrs. Englund?

A There was, yes.

Q In the construction of this boat, you heard the testimony there, that there were skid boards or whatever you call them on the stern of the boat?

A Yes, sir.

Q What were they there for, put on for?

A I had no power hoist on board for hoisting anything, and the deck is about 3 feet below the hatch combing and if there is anything heavy to be loaded on board, to get over the side, you have to slide it down; you can't drop it into the cockpit; you have to slid it on so it won't break up things.

(Testimony of Eric Hogstrom)

Q Have you used it for that purpose on this particular boat?

A Yes, sir, I used it when I was working for the moving picture corporation, the Paramount.

Q For what purposes did you use it?

A We had a generator that we slid down on it, to drive the electric lights generators to produce power for the electric lights.

Q What else would go down there?

A A little Ford motor; it wasn't very heavy. I guess it would be a thousand pounds or twelve hundred pounds.

Q What was the skid board made out of, what kind of wood?

A Plywood, about an inch thick; four ply wood; I think it was four or three ply; I don't remember now.

Q It had sufficient strength, did it not, to take on an ordinary small boat or tender or the launch?

A Oh, there is a lot of strength in that wood.

Q In the construction of this boat, she was—I don't know whether I have asked you that question or not—it was constructed not only for fishing, but in case that fishing did not pay, it could be used as a general utility boat?

A Yes, exactly.

Q Or for miscellaneous work. How many months in the year can a boat of that class be used along the coast for fishing exclusively?

A Well, in the summertime the barracuda runs and the mackerel runs, oh, about 3 or 4 months.

(Testimony of Eric Hogstrom)

Q And in the winter time?

A Well, in the winter time there isn't much fishing, because these big fishing boats, they go away down into Mexico; they are big fishing boats, big purse seiners.

Q During the time that you have had charge of this boat you did use her to some extent with the moving picture people, did you not?

A Yes, I did.

Q Has anybody ever stopped you or was the boat ever seized during that kind of work?

A No, sir.

Q Do you know approximately what the groceries that were on board that boat at that time would weigh, exclusive of the water?

A No, I could not tell as to the weight. We were not in the habit of weighing the groceries. We just ordered a few groceries; I don't know how much they weighed.

Q It would not be more than a half a ton all told?

A I don't think that much. Well, I really don't know what they would weigh, but I don't think it would weigh half a ton. That is one thing that we never weighed, any groceries.

Q About what time in the morning was it that you started out of San Pedro Harbor?

A Just about daybreak.

Q And you went out. Just explain to the Court how you went out, the course that you took.

A Well, I did not set any course at all. Leaving the breakwater, I wanted to get out far enough so I could clear—there was always a lot of driftwood next to the

(Testimony of Eric Hogstrom)

beach there, and there is an old buoy there. I do not think there is a light on it yet; I am not sure. And when I go to Santa Cruz, I usually steer out a little, say, a quarter of a mile, and then a course straight out south or south by west, over southwest, either course, until I think I am far enough out, and then I set my course for Santa Cruz Island, which is north and a half south or west a half south.

Q And at the time that your boat was seized, what course were you pursuing?

A Well, I didn't—I had no course set. I was going to set my course after I changed from that position to miss the buoy. I guess I was doing about west southwest.

Q There is a buoy out there, is there?

A Just about a quarter of a mile off of Point Firmin.

Q And in going to Santa Cruz, as I understand you, you were going out beyond the buoy and then from that point set your course for your final destination at Santa Cruz Island?

A Yes, sir.

Q Is that correct?

A Yes, sir.

Q And the boat was seized before you had accomplished this, is that true?

A Yes, sir.

Q If you had gone directly on in the course in which you were steering at the time that you were picked up, where would you have landed with reference to Catalina Island?

(Testimony of Eric Hogstrom)

A Oh, I guess I would have landed pretty close to the north end of the island, or west end rather, you call it.

Q Now, in going to San Clemente Island what would be the course that you would have taken in going out of the harbor?

A San Clemente?

Q Yes, sir, with reference to the course that you were pursuing at the time.

A If you will let me look at the chart, I can tell you. Can I look at the chart?

Q Yes, just step over to the chart.

(Witness at chart on blackboard).

THE WITNESS: You said Clemente, didn't you?

Q Yes.

A Well, here is Point Firmin light, (Indicating), and here is the breakwater light. (Indicating). You set a course right from there, well, about south three-quarters east. The course from San Pedro lighthouse to the east end of San Clemente Island.

Q You have sailed up and down that coast?

A Yes, sir, I have been fishing on the coast.

Q Have you ever fished at San Clemente?

A Yes, sir, I have.

Q In going from San Pedro to San Clemente, do you go to the westward or around the north end of Catalina Island and down that side or do you go between Catalina Island and the mainland?

A It all depends. You said if I want to go to the south end of Clemente? No, I go as a straight course from San Pedro breakwater to the east end of San Clemente Island. That would be putting you out of your

(Testimony of Eric Hogstrom)

way by going to the north of Catalina. You go like this: instead of going direct you can make a straight course for Clemente Island.

Q What course do the ordinary ships running up and down the coast take? Do they go around the north end of Catalina or do they go between Catalina and the mainland?

MR. CHICHESTER: Objected to unless the witness is qualified to testify as to the ordinary course that ships follow.

THE COURT: Well, we will let him answer.

Q BY THE COURT: Do you know the course usually followed by boats running from the breakwater to San Clemente Island?

A Yes, sir, I do.

MR. YAKEY: May I interrupt?

Q BY MR. YAKEY: You don't mean to give the exact figures in degrees. I want to know whether they go inside between the mainland and Catalina or whether they go around Catalina Island on the outside.

A Well, between Clemente and the mainland lies Catalina. You will have to pass Catalina to go to Clemente. If you want to go to the south end of Clemente or the east end, like we call it, you have to go to the east end of Catalina, the shortest route. If you want to go the other way, you just steer the opposite.

Q BY THE COURT: Well, do the boats sometimes in traveling from the breakwater to San Clemente Island go around Catalina Island?

A Yes, sir, they do; if there is any prospect of fish, they do.

(Testimony of Eric Hogstrom)

Q BY MR. YAKEY: Suppose there is no prospect of fish down there, how would they go?

A You don't know that until you come on the fishing grounds whether there is any fish or not.

Q It is according to what fishing ground you want to reach, is it not?

A Yes.

Q After your boat had been seized you had some conversation with several officers of the Government, did you not?

A Yes.

Q The man who went aboard the boat—do you remember what his name was?

A No, I do not. I did not ask his name, and he did not tell me his name.

Q BY THE COURT: Do you remember speaking to one of the Coast Guard officers who testified here on the stand, a man named Megos?

A Yes, I was speaking to the Captain; I was talking to him; he was hollering at me at a distance. We had to holler at each other at a distance; we could hardly hear each other. The engines were going, and it was a little off between the boats.

Q At the time that you were seized, did you tell him that you were on your way to San Clemente Island?

A No.

Q What did you tell him?

A I told him I was going to Santa Cruz Island.

Q Had you any intention at the time that you left the harbor at San Pedro, at the time you left the docks, any intention of going to San Clemente at all?

(Testimony of Eric Hogstrom)

A No, sir.

Q And you left the dock to go to Santa Cruz Island and Santa Cruz Island only?

A Yes, sir.

Q At any time in this conversation did you advise the party to whom you were talking that the goods that were on there were being taken over to the island to be used there at Santa Cruz Island?

A Well, he never asked me anything like that. He said, "You will have to wait awhile until I telegraph the Base, until I see what they are going to do with you." He said, "We think they are going to pull in your boat."

Q Did he ask for a list of the groceries that you had on board?

A They had a list on the Coast Guard boat.

Q Did you give him a list?

A I did not have a list on me; at least, I could not find it then.

Q Did you give him a statement from memory?

A Yes, sir, he saw it there; he went over everything and saw everything that was there.

Q You showed him everything that was there?

A Yes, sir, and he saw everything.

Q What was said at that time, if anything, as to why he wanted to check over the list?

A Well, the captain of the Coast Guard, he called his man that was on board searching my boat, and he called him over, and he said, "Here, take this list and compare it with the groceries which he has on board," which he did, and he hollered back to him and he said, "They have some groceries on board, but it isn't anything like this

(Testimony of Eric Hogstrom)

list; there is just about one-third of what he has on the list; some it compared with it," he said. Naturally, a bag of potatoes compared with another bag of potatoes.

MR. YAKEY: You may cross examine.

CROSS EXAMINATION

BY MR. CHICHESTER:

Q How long have you been in the fishing business?

A About 15 years.

Q Where did you first do your fishing, what part of the country?

A Down in Mexico, on the Vispor.

Q How long have you known Mr. Kirk?

A 5 or 6 years.

Q When was it that you and he got together for the purpose of getting this boat?

A If I remember, it was over in Redondo.

Q When was it?

A About 5 or 6 years ago.

Q About 5 or 6 years ago?

A Yes, when I got acquainted with him, yes.

Q What did you do with respect to getting a boat such as this at that time?

A Oh, we talked about fishing boats, and he said he had a little ready cash lying, but that that was forgotten for the time, at the time I met him.

Q Did you get the boat then?

A No, not at the time I met him; that was 5 or 6 years ago I met Kirk.

Q When did you prepare to get this boat?

A About the last of March, of last March.

(Testimony of Eric Hogstrom)

Q Did you order the boat to be built by the Kittenberg Boat Works?

A Yes, sir.

Q You put in the order yourself?

A No, I did not put in the order; I was supervising the job.

Q For whom?

A For Mr. Kirk.

Q Was he present at the time it was being built at all?

A Yes, he was there a couple of times.

Q How often was he down there?

A I don't know.

Q Was he there more than twice?

A I don't know; I wasn't there all the time.

Q It took a period from March until October to complete the building of that boat after the motor had been torn down a couple of times?

A That was an old second hand motor.

Q It took from March until October to complete the building of that boat?

A Yes, sir.

Q And you were at the boat works during the period of the building of that boat?

A I lived at San Pedro, and I used to go down there.

Q And the boat was being built at Point Loma, just outside of San Diego?

A Yes.

(Testimony of Eric Hogstrom)

Q How did you go down there?

A In a car.

Q Did you put any money into the building of this boat?

A No.

Q Not any?

A No.

Q You entered into a charter party with Mr. Kirk, I believe?

A Yes, sir.

Q Did you ever pay him any part of the $300 rental called for in that charter party?

A I could not make any money; I could not pay him.

Q When was it you first agreed to charter the boat from him?

A That was when the boat was completed.

Q Where did you make this agreement?

A Down at San Pedro at Howard Wickersham's office.

Q Who else was present?

A There was nobody present but him and me, Kirk and me.

Q Just the two of you?

A Yes.

Q No one else in Mr. Wickersham's office?

A He was there himself.

Q Who drew up the contract?

A Mr. Wickersham.

Q What kind of fishing did you intend to do with this boat when you obtained the document for fishing?

(Testimony of Eric Hogstrom)

A I was intending to setline and swordfishing, commercial fishing.

A Did you do any of that kind of fishing?

A Yes, I tried, but I had no luck.

Q Swordfishing and what?

A Not swordfishing, but rock cod and sardines.

Q How much fish would you have to catch to make it a good paying proposition commercially?

A Swordfishing pays pretty good if you can go out and catch five or six big swordfish that weigh all the way from 500 to 800 pounds.

Q What will that pay you?

A 24 cents a pound.

Q Did you ever do that?

A I tried to.

Q Did you ever do it?

A No.

Q What sort of tackle would you use to catch a swordfish weighing 500 to 800 pounds?

A You use a spear with a line attached to the spear. There is a ball with a rod in it that goes into an arrow spear, and you throw it down, and it gets into the fish, and you throw it down, and the rod comes out of the spear, and the line is attached to it, and it opens up, and you haul in the line.

Q Did you have any such tackle on the boat when it was seized?

A No, we took it off at the time we went to the island with the groceries.

Q Where is that tackle now?

A Home in my garage.

(Testimony of Eric Hogstrom)

Q You at no time made any money using the V-293 in the fishing business?

A No.

Q Such work as you had it employed for was in the moving picture business?

A Yes.

Q And that was only for a few days, wasn't it?

A Well, it was, I think, about 8 days; I think it was 8 days.

Q Did you have any other source of income other than what you obtained from the use of this boat?

A No.

Q Where did you obtain the money to buy these groceries which you listed as having been purchased from the market?

A I still owe for them; I never paid for them.

Q Where did you get the money to pay for the load of gasoline that the V-293 had?

A I didn't even pay for that.

Q You had operated this boat on a number of occasions prior to this particular time it was seized for moving picture work. How did you get the money to pay for the gasoline you used?

A They paid for the gasoline; expenses all paid.

Q You never have used that boat other than on those occasions, is that correct?

A No, that is all.

Q That is the only time you ever used it?

A For making money purposes?

Q Did you ever use it for any other purpose?

(Testimony of Eric Hogstrom)

A Oh, yes, I would run around the bay with it. I had a lot of trouble with the motor, and every time I made a couple or three hundred dollars in the pictures I had to spend it on the motor and the clutch.

Q Where did you obtain the money to buy your gasoline for the 300 horsepower motor which was installed in this boat?

A I made a little money in the movies.

Q That was the only source of income that you had?

A Yes.

Q Do you recall February 28th when you were boarded by the boatswain Lundberg, on February 28th, and there was a Mr. Johnston and another man aboard the vessel; do you recall that occasion?

A I did not know who he was; I remember he was a coast guard.

Q They did board your vessel?

A Yes, sir.

Q Where had you been on that occasion?

A We were out on a trial trip, to try the motor out. That is why I had these men on board. He was a first class engineer and we ran around the gambling ships out there and I tested the motor and came back.

Q On this particular occasion, on the morning of March 3rd, which officer boarded your vessel?

A I don't know his name.

Q Didn't you say to him that you were going to San Clemente?

A You mean when I was seized?

Q Yes, sir, the first time you were questioned concerning your destination?

(Testimony of Eric Hogstrom)

A No, I don't think I did. I said I was going to Santa Cruz Island?

Q Are you sure you did not say that?

A No, I did not say that.

Q Had you ever seen this chart before (indicating chart on blackboard)?

A This chart here?

Q Yes.

A I do not remember. They are all alike.

Q Did you have a chart on the boat?

A Yes, sir, we have charts on the boat.

Q Was it like that one?

A I don't know if it was that one. We buy them.

Q Did you buy that one?

A It has no special markings. I don't know that it was mine.

THE COURT: Q. Did you have one that resembled this chart?

A Oh yes.

MR. CHICHESTER: Q You stated that you were going out there to Pig Canyon and you had not been working prior to that time for quite some period, doing any work?

A The last time I worked was for the movies.

Q How long before?

A Well, I don't recollect exactly how long before.

Q A week or a month?

A That was the first job I had with the movies since I took charge of the boat.

Q That was the first money you made?

A Yes, sir.

(Testimony of Eric Hogstrom)

Q How much money was that?

A I don't recollect now. I had the checks for it. I think it was about two or three or four or five hundred dollars, about five hundred or five hundred fifty dollars—five hundred and fifty dollars.

Q And you were going on this trip to hunt and for a vacation?

A Yes, sir.

Q How long prior to this time had it been that you had been to this island?

A Oh, I think it was two years.

Q You had not been out there for two years?

A No.

Q You had not seen Englunds for two years?

A Yes, sir, I had seen them.

Q Did they know you were coming on this trip?

A No, they did not know I was coming.

Q Did your wife know you were going on this trip?

A Yes, sir, she knew I was going to the island, but she did not know whether I was going that morning or the next day.

Q You did not tell her when you were coming?

A I never tell my wife exactly everything.

Q You did not tell her where you were going?

A Not every time.

Q You were going to be gone for approximately two weeks and yet you did not tell anybody about the destination or how long you would be away?

A There was no occasion to tell anybody.

Q Why did you take Mr. Larsen along? What was the name of the man with you, Larsen?

(Testimony of Eric Hogstrom)

A No, his name was Johnson.

Q I will show you a picture and ask you if that is Mr. Johnson? (Handing photograph to witness.)

A That is Mr. Johnston.

Q Bearing the name "Anderson". Do you know whether he also uses the name of Anderson?

A I don't know.

Q Was he going on a vacation too?

A He was going along with me, yes, sir.

Q Just on a vacation?

A Well, it takes two men to run a boat.

Q What kind of tobacco did you take along on that trip?

A I do not recollect exactly what kind it was.

Q What kind do you smoke?

A Me? I smoke Edgeworth.

Q Any other kind?

A Yes, sir, I smoke any kind myself, Prince Albert, Lucky Strikes.

Q For whom were you taking that tobacco?

A I was taking it over to the island for my own purposes and the people over there.

Q Did you think that ten pounds of tobacco was enough to last you for twelve days?

A Well, as I stated before, those people can't get to the mainland every week.

Q You stated that these supplies were brought to that island ordinarily by the Largo people; is that correct?

A During the season.

Q During what season?

A During the crawfish season.

(Testimony of Eric Hogstrom)

Q You stated the fishing season was from April 1st to October 1st.

A The 15th.

Q October 15th, and this was in March. This was just prior to the opening of the season?

A From the 15th of October until the 1st of April is the crawfish season.

Q Then the season was still on, this was March 3rd?

A No, the season was over when I was going to go over there.

Q But it was March 3rd you were going over?

A No, no.

Q That is the date you were seized?

A March 3rd?

Q Yes.

A No, it was not.

THE COURT: Q What date was your boat seized?

A I am getting all mixed up here now. Was it March? I don't recollect now when it was seized.

THE COURT: Q When do you say is the crawfish season over at the island?

A From the 15th of October until the 1st of April, I think it is; I am not sure.

THE COURT: Q And during that season there is usually a boat from the mainland to the island once a week?

A Yes, sir.

Q Bringing provisions?

A Yes.

MR. CHICHESTER: Q At the time you went back to your house with Mr. McFarland and Mr. Fletcher,

(Testimony of Eric Hogstrom)

your wife was very much surprised to see you there with these men, was she not?

A I didn't notice anything peculiar about it.

Q She had your dinner there waiting for you, didn't she?

A No.

Q You are sure of that?

A Yes, sir, I am sure of that.

Q She did not know where you were going?

A She was eating her dinner or had her dinner when we got up there.

Q She stated that she had your dinner ready for you, didn't she?

A I don't think she did.

Q You are not sure about it?

A Yes, sir, she did not.

Q Referring now to the construction of that boat, you said that skid-board was for the purpose of removing the dory?

A And loading things I needed for the moving picture work.

Q When you built that boat, did you have any idea you were going to use it in the moving picture work?

A Yes, sir, I had communications with the man who had the making of the negotiations with the people that hired me.

Q Who were they?

A Mr. Buck McGowan and M. P. Wilson.

Q Where are they now?

A They are located at the West Basin Yacht Anchorage.

(Testimony of Eric Hogstrom)

Q They are not in court, are they?

A Yes, sir, I saw Mr. Buck McGowan here today.

Q And you had that boat built with the idea of using it in the moving picture business?

A If the fishing was no good.

Q What other purpose could it be used for except fishing?

A For a party boat and taking people over to the Island.

Q What would be the use of that skid-board in taking people over to the Island?

A When we load a life-boat, it stands on that. It stands side-ways or length-wise in the cock-pit, this way. (indicating), and it is good for sliding the boat on and off.

Q What would you want to get it off for?

A You have to get it into the water some-times.

Q You fish from the big boat?

A Yes.

Q What do you carry the dory for?

A For a life-boat.

Q Where did you keep it?

A In the cockpit.

Q Why did you have the stanchions that hold it over the cockpit?

A If the moving picture who hired me—if I would have things in the cockpit I could not put the dory in.

Q Didn't you tell Mr. McFarland that that skid-board was to keep the fish in the boat?

A I don't recollect saying that, sir.

Q Do you recall, also, that there is a skid-board here and also two side chutes, as well, built into that part; isn't

(Testimony of Eric Hogstrom)

that correct? (indicating diagram or sketch on blackboard).

A Yes.

Q What is the purpose of those two side-boards?

A Those are deck supports from the cock-pit, up underneath the deck.

Q What is the weight of those boards?

A It is plenty strong enough so it won't knock the pieces off when you take in a piece of machinery out of the cock-pit.

Q Then, from March 1st to April 1st, the fishing season was on and the Largo boat was able to carry food and foodstuff to the Island?

A During that time that I was going out there the fishing season was over; I know that.

Q How do you know that?

A I seen some fishermen going into Pedro with their last catch.

Q You were going out there to hunt these pigs on the Island?

A Oh, we kill a sheep once in a while, too.

Q And you weren't going to stay in the one location on the Island?

A Oh, we usually get in the boat and go out and do a little fishing.

Q Then you go from ranch to ranch around the Island?

A There is no ranch on the coast; it is on top of the hills.

Q I believe you said you were going to see the Englunds and then one or two other places?

(Testimony of Eric Hogstrom)

A That was the fishing camps.

Q Did you have any guns along to do any hunting?

A No, Mr. Englund always has guns and ammunition over there.

Q But he did not know you were coming over?

A No, but he is always there when I go over there.

Q And you had no fishing tackle?

A No.

Q How were you going to fish?

A Oh, he has plenty of gear on the Island.

Q You obtained a California fish and game license, didn't you?

A Yes, sir.

Q When did you obtain that?

A Well, I really don't know the exact date.

Q Why did you obtain it?

A You have to have a fishing license when you want to go fishing.

Q But you never did any actual fishing?

A But if I was going out doing fishing with no license, I was entitled to a fine.

Q Unless you were doing private fishing, sport fishing?

A Then you would have to have a license, too.

Q When you left San Pedro with this cargo of goods, instead of taking the cargo from San Pedro why didn't you take it from Santa Barbara?

A I had no credit in Santa Barbara and up at Santa Barbara is a long way up.

Q What was the speed of this boat?

A I don't know—about 20 or 25 miles.

(Testimony of Eric Hogstrom)

Q 20 or 25 miles an hour?

A Yes, sir.

Q Isn't that a pretty fast boat for a fishing boat?

A No, I don't think so. You can build them as fishing boats with a lot more.

Q Do you know of any other fishing boats down in the harbor that travel that fast?

A No, I do not.

Q You were taking this 50 gallons of fresh water along to the Island?

A Yes, sir.

Q There was plenty of fresh water on the Island?

A Yes, sir, a kind of fresh water, but it is a kind of brackish.

Q Do people live there all the time?

A Yes, but they bring the water from the mainland whenever they have a chance, like I told you.

Q You were taking this water out to cook peas and beans?

A Well, to use in camp.

Q But you stated on direct examination that you were taking the water out to cook beans and peas and to wash hair, isn't that correct?

A I said you can't wash your hair with the water they have on the Island and you cannot cook peas and beans in it, and you always get the fresh water from the fishermen, if there are any around there. I have done it myself. I have gone out and bummed water and even groceries. Every fisherman that goes out there always takes water and groceries.

(Testimony of Mrs. Belle Hogstrom)

Q Then these people from April to October are always without fresh water unless they get it from the mainland on a special trip?

A They have drinking water but they always try to get the fresh water whenever they can.

Q There are springs around the Island?

A But it is all the same water, a kind of brackish.

Q What is that?

A A kind of alkaline or salty.

MR. CHICHESTER: I believe that is all.

THE COURT: Any redirect examination?

REDIRECT EXAMINATION

BY MR. YAKEY:

Q Just a question. At the Englund camp out there they have a tank there, have they not, for the purpose of storing fresh water that they get from the boats that come in?

A Oh yes.

MR. YAKEY: I think that is all.

THE COURT: That is all.

(Witness excused.)

MRS. BELLE HOGSTROM,

a witness called and sworn on behalf of the Claimants, testified as follows:

DIRECT EXAMINATION

BY MR. YAKEY:

Q Mrs. Hogstrom, you are the wife of Captain Hogstrom who just left the stand?

A I am.

(Testimony of Mrs. Belle Hogstrom)

Q Do you remember the day upon which the boat, V-293, the boat that Mr. Hogstrom was using, was seized?

A I do.

Q Do you remember the incident of the officers coming to your house in the evening?

A I do.

Q And at the time that they came in was Captain Hogstrom with them?

A Yes.

Q Do you remember the conversation you had with them there at that time?

A Yes, I do.

Q Just state what conversation you did have with them there at that time.

A Do you want me to give it in my own words?

THE COURT: Yes.

THE WITNESS: A They asked me if I knew where my husband was going and I said at first, I said "No," because I did not know what to think of them coming in with him and I thought something terrible had happened; it frightened me; I thought he had a wreck or an accident of some kind and I was flustered a little at first, but when I saw it was all right and I thought there was nothing wrong, it seems as though I gained my composure and then I answered what questions they asked me, and they asked me if I had a letter, or my husband spoke first and asked me to get that letter I had from Ray, and I said "Which one?", and he said, "That last one you got," and I did; I went and brought the letter in and they read it.

(Testimony of Mrs. Belle Hogstrom)

MR. YAKEY: Q Is this the letter? (Handing document to witness.)

THE COURT: Respondents' exhibit A.

A Yes, sir, this is the one.

MR. YAKEY: Q And did you show it to him?

A I did.

Q Did he read it?

A Yes, sir, both officers read it.

Q What conversation, if any, did you have with regard to the dinner?

A My husband asked me for a drink of milk or a glass of milk and I said, "Haven't you had any dinner?", and I said, "There is dinner just ready; I have just eaten mine;" we had dinner just ready; "I have just eaten mine."

Q Had you prepared dinner with the expectation he would be there for dinner?

A No, I had not. I had my own dinner but I had enough; there was plenty in the ice-box that I could have fixed it in a minute for him.

Q Now, Mrs. Hogstrom, you have visited Santa Cruz Island?

A Yes.

Q And visited the Englunds there?

A Many times, several times, and I have lived there.

Q You have lived there?

A Yes, I have lived on the Island.

Q At times you would go over there. What was the custom with regard to taking provisions and so forth?

A We have always taken provisions when we went there, always, for ourselves and for their benefit. We did

(Testimony of Mrs. Belle Hogstrom)
not feel like imposing on them; they were poor people like we were and we took enough to help them over, as well as ourselves, every time we went.

Q That is your custom and it is really the custom of people visiting the Island?

A When I lived there it was customary for fishermen to bring groceries and fresh water for me.

Q There was no communication with the main land?

A None at all, not outside of the fishing season there wasn't.

Q Any telephone or any cable?

A Nothing like that.

MR. YAKEY: That is all.

CROSS EXAMINATION

BY MR. CHICHESTER:

When your husband and Mr. McFarland and Mr. Fletcher first came to your house on March 1st, who was the first one to talk to you?

A They all came to the door together; I don't know who spoke first.

Q Who was the first one to talk?

A I don't remember which one talked first.

Q It is a fact that your husband spoke to you first?

A. I can't remember whether he talked first or whether Mr. McFarland spoke first.

Q Didn't he ask for the letter shortly after he got into the house?

A Yes, sir, shortly after he got into the house.

Q And you didn't know what letter he referred to at first?

(Testimony of Mrs. Belle Hogstrom)

A He said, "Have you got that letter from Ray?", and I said, "Which one?". I had many letters from Ray.

Q That was just a recent letter. Why did you have your husband's dinner ready for him?

A When he is on a fishing boat I don't know when he is coming.

Q How do you know when he was on a fishing boat?

A That is his occupation.

Q Did you know where he went that morning?

A I could imagine where he went but I didn't know exactly.

Q Did you have an idea he was going to be gone two weeks?

A He often is gone two weeks.

Q I mean at that time?

A Yes, I imagine he did.

Q Did he mention it to you?

A We had mentioned it beforehand, about him going to the Island.

Q What was his purpose in going to the Island?

A Visiting.

Q But he was not going to take you?

A No. I get too sea-sick. If I go to Santa Barbara I want to go with a fisherman that is going in two or three hours. I get deathly sea-sick.

Q But you were not going at all on this trip?

A No, not on this trip.

Q And your husband was taking a vacation?

A I think he was.

Q And he had not been working before that?

A He worked for the moving picture people.

(Testimony of Mrs. Belle Hogstrom)

Q That was the only time he had been working?

A In how long a time?

Q During the past year how long had he been working?

A I cannot set the time.

Q How much did he earn during the past year, during the last year up until March 3, 1932?

A I would have to look that up. I cannot tell you how much he earned; not enough to pay income tax.

Q Without any reflection upon wealth, you stated you were poor people like the people on the Island?

A Yes.

Q And he was buying $69 worth of food to take out to the Island?

A I did not say he was buying $69 worth.

Q Where was he to get the money to make these purchases?

A He said he did not pay for them.

Q He was able to take a vacation for two weeks?

A It was rather an enforced vacation; there was no work at that time.

Q Do you know Mr. Johnston?

A I know several people by the name of Johnston.

Q Do you know Mr. Johnston who was on the boat with your husband on this particular occasion?

A Slightly.

Q Do you know where he is now?

A No.

Q When did you see him last?

A I don't remember when, whether it was soon after that or later; I do not remember; I do not see him much.

(Testimony of Mrs. Belle Hogstrom)

Q You know him as a notorious rum-runner?

A I do not.

Q I show you a picture and ask you if that is Mr. Johnston? (Handing photograph to witness.)

A Well, that is the name I knew him under.

Q He looked like the same man?

A Yes, sir.

Q You did not know that he was going on this trip to the Island with your husband?

A No, I didn't.

Q You have lived on the Island, have you?

A Yes, sir.

Q How long?

A I lived 6 months on Santa Cruz Island and 10 months on Anacapa Island, where we have no water at all, only the water brought in by the fishing boats.

Q Were you married at that time to Mr. Hogstrum?

A Yes, sir.

Q Was he living there?

A Yes.

Q Did he ever do any hunting on Santa Cruz Island?

A Yes, sir.

Q How did he hunt?

A With a gun.

MR. CHICHESTER: That is all.

MR. YAKEY: That is all.

(Witness excused.)

(Testimony of Mrs. Ray Englund)

MRS. RAY ENGLUND,

a witness called and sworn on behalf of the Claimants, testified as follows:

DIRECT EXAMINATION

BY MR. YAKEY:

Q You live on Santa Cruz Island, Mrs. Englund?

A Yes, sir.

Q And you live there with your husband and family?

A Yes, sir.

Q Are you acquainted with Captain Hogstrom and Mrs. Hogstrom, who have been on the witness stand here?

A Yes, sir.

Q How long have you known them?

A Oh, many, many years.

Q Were you in frequent correspondence with them?

A Yes, sir.

Q And on friendly terms?

A Yes, sir.

Q Were they in the habit of making you frequent visits on the Island?

A Well, they had not been over there for a couple of years, but whenever they had a chance and there was nothing to do they made a trip. They would come over and spend, sometimes they would spend 3 or 4 days, sometimes a week, sometimes 2 weeks.

Q During these visits what was their custom with regard to furnishing provisions?

A They always brought provisions with them, always.

(Testimony of Mrs. Ray Englund)

Q Do you have other friends who come to the Island and visit you?

A Yes.

Q What is the custom with regard to them?

A It is the same; all our friends bring their provisions. They do not feel like coming over there and eating off of us. They bring their provisions and I cook for them, all together.

Q Then, any provisions left from the trip, what becomes of them?

A They leave them with me.

Q In case there are more provisions than you can use, what do you do?

A Beg pardon?

Q For instance, if there are more eggs or meats or things of that kind, while your company is there, what do you do with them?

A If it is beef I can pickle it down and make corned beef of it, and in these camps a little on both sides of us, we can divide it. If it is eggs—I have chickens but I do not have very many eggs. They lay in the brush and cactus. The eggs, they can be put down in water glass, which is a liquid to preserve eggs in.

Q What is Mr. Englund's business?

A Fishing.

Q And he is equipped with fishing tackle and nets and so forth?

A No nets. He does not fish with nets; he fishes with lines. In the summer—he does not do a great deal of fishing in the summer, but what he does he does with lines. But in the last few years there has not been much

(Testimony of Mrs. Ray Englund)

fishing in the summer except for our own use. In the winter he fishes for crawfish or lobster. We call them crawfish.

Q Only for lobster?

A Yes.

Q And during the fishing season you have company as in any other season?

A Surely.

Q Your company comes there during the fishing season as well as other seasons?

A Yes, sir.

Q And it is the custom for them to bring provisions with them for you and in return they use the fishing tackle and fishing supplies of Mr. Englund?

A Yes, sir, and our camp; they make themselves right at home. I cook for them and they live there while they are there.

Q How do you get your provisions on the Island?

A In the winter time we have a boat that comes after our fish and they bring our stuff to us. In the summer time we have no way. We have to just depend on some boat or someone we know that comes in there. Sometimes they will take me over to Santa Barbara and if they are coming back in a week or so I will send a list in, but we never know when we are going to have a chance.

Q Is any charge made by any of these people for doing that for you?

A No, sir.

Q And it is the custom of the Island that anyone that is going to the mainland at Santa Barbara or Los

(Testimony of Mrs. Ray Englund)

Angeles, that anyone that wants provisions, they get them and bring them to them without any charge so far as transportation is concerned?

A Yes, sir.

Q Now then, with regard to water, is there any fresh water on the Island?

A Yes, sir, there is lots of fresh water. We have a well at our place but you cannot wash your hair in it. If you do, your hair comes loose and falls out. You cannot cook no beans or peas or anything like that in it.

Q How do you get the fresh water, then?

A In the winter-time when our tender is running it brings the fresh water every week.

Q About how much do you get of fresh water?

A I have five gallon cans and five gallon bottles and I send in two or three a week, say, two a week, with the tender, and then next week he brings them back and I give him two more and so on, all the season, but in the summer time if any fishing boat comes in and we are short of water we go out and ask them for ten or fifteen gallons, whatever they can spare.

Q And they always let you have it?

A Yes, sir, if they have it.

MR. YAKEY: Cross examine.

CROSS EXAMINATION

BY MR. CHICHESTER:

Q You have your own chickens?

A Yes I have.

Q About how many?

A 12 hens and a rooster.

(Testimony of Mrs. Ray Englund)

Q If Mr. Hogstrom brought out 36 dozen eggs, that would be quite a number of eggs for you to eat with Mr. Johnston and Mr. Hogstrom.

A Well, there are three of us over there and I believe there were two on the boat; that is five. I cook four eggs every morning for my husband, if I have them.

Q Nevertheless, 36 dozen would last quite a while?

A I bake; I do lots of baking.

Q It is in excess of 400 eggs. You would not have an opportunity to use them up in a very short time before they would spoil.

A 400?

Q Yes.

A It was a case of eggs, wasn't it?

Q Yes.

A That is 30 dozen.

Q 36 dozen were found in the boat at the time of the seizure.

A I believe I could use them up. If not, I could give them to either the camp below us or the camp above us. The camp below us has no chickens.

Q You stated there is plenty of fresh water on the Island, isn't that correct?

A Yes, sir.

Q Do you have any kind of garden out there?

A Yes, sir.

Q Do you raise any beans or peas in the garden?

A I raise beans.

(Testimony of Mrs. Ray Englund)

Q That would be the only need of this water, to put beans and peas and to wash your hair? You would not need it for drinking purposes?

A We drink it, too. That water on the island is so full of alkali—you can drink it but you cannot wash your hair in it; you cannot cook beans or peas in it and you cannot wash your hair with it.

Q How long before had Mr. Hogstrom been over there to visit you?

A It was around two years.

Q You did not know he was coming on this occasion?

A No, sir.

Q You did not ask him to bring over any food-stuff or any materials?

A No, sir.

MR. CHICHESTER: That is all.

THE COURT: That is all, madam.

MR. YAKEY: That is the respondents' case, your Honor.

MR. CHICHESTER: We would like to call one witness in rebuttal.

THE COURT: For what purpose?

MR. CHICHESTER: To establish whether or not this boat was headed for San *Cemmente* Island or whether it was headed for Santa Cruz. We had a witness in court who made the first notations—

THE COURT: It appears to us that there is sufficient in the case to indicate that. One of the Government officers has stated the direction. The man on the boat hasn't any real idea or recollection of what direction the boat was headed at the time of its seizure. If there

is no other purpose in calling a rebuttal witness, the Court believes that the evidence should be concluded and I would like to hear from the respondents.

MR. YAKEY: You mean an argument, your Honor?

THE COURT: If you have any argument to make.

MR. YAKEY: I have prepared hardly what you would call a complete brief, because I did not have time to do that, but our contention, as set forth in that, your Honor, is that there was not a violation of Section 4377.

THE COURT: Do you wish to present an argument?

MR. YAKEY: Yes, your Honor.

THE COURT: Very well. Proceed.

(Argument by Mr. Yakey.)

THE COURT: The argument presented here on behalf of respondents is founded upon certain premises. There might be considerable plausibility to the contention of the respondents if the Court could agree with the premises. As we listened to the testimony of these witnesses it occurred to us that outside of some such tale as those written by Robert Louis Stevenson, one would hardly be expected to find such an explanation as was offered here by the man operating this boat. His story is fantastic and does not ring true, a man who has been out of employment for many months, except occasional employment, who has a boat that he states he has rented under an arrangement to pay $300 monthly rental therefor, and has paid no rent thereon for months, and then proceeds to place provisions on board the boat far beyond his own needs and during a period of time when the alleged persons on the Island for whom they were supposed to be intended were in a position to ob-

tain supplies at least weekly, whose boat when seized is headed not in the direction of the supposed destination but headed on a course quite considerably different, and whose explanation of certain peculiar contrivances on his boat, presumed to be provided for a purpose that was not admittedly the principal purpose in building the boat, a boat which is equipped to operate at a speed admittedly much faster than any fishing boat in these waters—it strikes us that the admitted circumstances, if there were nothing else in the case, stamp the story related here by the man operating the boat as one wholly unworthy of credence. It is our view that this man was taking these provisions not to the island but that he was headed for a destination in connection with a commercial transaction; that instead of just starting out on a vacation, he was engaged in a pursuit for the making of money, and that he proposed to deliver these provisions at a price; that the boat was never authorized to be employed in any such purpose.

We shall hold that there was a violation as charged and direct the decree accordingly. Government counsel will prepare findings and a decree is granted and an exception will be allowed.

Do you care to stipulate as to the time within which a bill of exceptions may be filed?

MR. CHICHESTER: How much time does counsel desire.

MR. YAKEY: If my physical condition were better I would not want more than ten days.

THE COURT: You mean ten days after the filing of the decree?

MR. YAKEY: Yes, your Honor.

THE COURT: Very well.

[Endorsed]: Filed Jul 21, 1932. R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

NOTICE OF APPEAL

To: The United States of America, Libelant; and S. W. McNabb, United State Attorney, I. F. Parker, Assistant United States Attorney, and Frank M. Chicester, Assistant United States Attorney, its proctors

You and each of you WILL PLEASE TAKE NOTICE that the respondent and claimant, F. E. Kirk, of the "AMERICAN GAS SCREW V-293", her motors, tackle, apparel, furniture etc., by his proctor, H. Wm. Hess, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the decree made and entered on the 10th day of May, 1932, and the amended and final decree made and entered on the 28th day of May, 1932, and the whole thereof.

DATED: Los Angeles, California, June 8, 1932.

H. Wm. Hess
H. WM. HESS
Proctor for Claimant and Respondent

[Endorsed]: Filed Jun 8 1932 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

ASSIGNMENT OF ERRORS

NOW COMES THE APPELLANTS, the American Gas Screw V-293 and Fallon E. Kirk only by H. Wm. Hess, their proctor, and in connection with their petition for appeal say that, in the record, proceedings and in the final decree aforesaid, manifest error has intervened to the appellants, to-wit:

I

The District Court erred in finding and holding that all of the allegations of the libel are true.

II

The District Court erred in finding and holding that all the denials set forth in the answer of the owner of the respondent vessel herein are untrue.

III

The District Court erred in finding and holding that the allegations of paragraphs I and II of the affirmative defense in respondent charterer's answer is untrue.

IV

The District Court erred in finding and holding that the allegations of paragraph I of the respondent owner of said vessel was untrue.

V

The District Court erred in finding and holding in paragraph III and IV of the findings of fact that the respondent vessel was engaged in trade other than that for which she was documented and *and* such finding of alleged fact is manifestly erroneous, obviously unsupported by the evidence and is the direct result of inference, conjecture and speculation resultant from the admission of incompetent prejudicial and inadmissable evidence.

VI

That the District Court erred in holding and finding in paragraph III of the findings of fact that respondent vessel was documented SOLELY for fishing and for that the Government's Exhibit No. 9 which is a copy of the application clearly and definitely recites that the PRINCIPAL occupation will be fishing.

VII

That the District Court erred in finding and holding that the said respondent vessel together with her motors, tackle, apparel and furniture was engaged in a trade other

than that for which she was licensed or documented in violation of Section 4377—R. S. 46—U. S. C. A.—325 and that such conclusion No. 1 is against the law, and is wholly unsupported by the evidence and is clearly presumptive and arrived at from prejudicial inference.

VIII

That the District Court erred in finding and holding that the owner of the respondent vessel knew at the time of documentation or AT ANY OTHER TIME, that the respondent vessel was to be used for purpose other than that for which she was documented.

IX

That the District Court erred in admitting for identification Government's Exhibit No. 1 and for that the same is not a public record and no foundation was even laid for its admission and that in reality and fact it is a confidential generalized circular to employees of a Government bureau, interposed in the instant matter for the sole and only purpose of prejudicing the rights and property of the respondent herein.

X

That the District Court erred in admitting to evidence any of the direct testimony of the Government witness Allen Loyal Lundberg and for that the entire chain of testimony neither serves to prove or disprove any material allegation contained in the libelant's Libel of Information but on the contrary goes in its entirety to a date, place and occurrance not germane to the issues herein and was inserted for prejudicial reasons only.

XI

That the District Court erred in admitting to evidence, that part of the direct testimony of Government witness

Lieut. John Hay Fletcher and for that the witness was permitted to testify as to conversations without the presence of respondents and is not binding upon the respondents herein as such evidence is clearly hearsay and contrary to the law.

XII

That the District Court erred in admitting to evidence that part of the testimony of the Government witness Lieut. John Hay Fletcher and for that the witness was permitted over the objection of respondent's proctor to interpose an opinion and conclusion without qualification as concerned the mental and physical action and reaction of one of the respondent's witnesses.

XIII

That the District Court erred in admitting any or all of the testimony of the Government witness, Thomas Noland and for that all the evidence is incompetent and speculative and purports to connect the respondent vessel and owner with an act and deed occurring in foreign waters on a prior date, far remote from the situs of the case at bar.

XIV

That the District Court erred in not admonishing and cautioning the proctor for the libelant and for that the libelant's proctor throughout the entire presentation of this matter consistently and with design interposed inadmissable statements and inflammatory questions and observations of such a biased, prejudicial nature as to preclude respondents from their constitutional prerogative, namely, the right to a fair trial.

XV

That the District Court erred in not dismissing the Libel with Costs.

XVI

That the District Court erred in holding and finding that the Respondent vessel had deviated from its plotted course and for that the Respondent vessel was still within the confines of the zone of navigation of the harbor and due care and caution was and is required within such zone to avoid incoming vessels, debris, flotsam and jetsam of the waterfront, buoys and ground swells of the sea.

XVII

The District Court erred in finding and holding that the respondent vessel was on or had any plotted course at the time of seizure and for that the respondent vessel was so closely contiguous and adjacent to the harbor and shore as to place such decision into the realm of speculation and theory and contrary to the law.

XVIII

That the District Court erred in holding and finding that the Respondents or any of them, received or were to receive any consideration, emolument or monetary reward for the goods, wares and merchandise aboard the Respondent vessel and for that the uncontradicted affirmative evidence and all of it definitely establishes the contrary.

XIX

That the District Court erred in holding and finding that the Respondent vessel was engaged or about to engage in an illegal venture and for that the evidence does not disclose any conspiracy of any kind, does not disclose any contact with any vessel at any time, for

legal purposes or otherwise; does not disclose any intention of contacting other vessels; does not disclose the ability of the Respondent vessel to withstand the perils and rigors of the high seas.

XX

The District Court erred in holding and finding that the Respondent vessel came within the purview of the statute by virtue of which authority the libelant acquired the property of the respondent herein, contrary to law.

XXI

The District Court erred in holding and finding that the Respondent herein forfeited his property, the Respondent vessel, to the Libelant, and for that, such holding and finding is directly contrary and opposed to both the letter and the spirit of Section One, Article Fourteen of the Constitution of the United States of America.

XXII

The District Court erred in entering a Decree in favor of Libelant and against the respondent and predicating such Decree upon the lack of cohesion of the evidence of the Respondent's defense rather than the preponderance of proof of the libelant.

XXIII

That the District Court erred in finding that a Decree be entered in this cause declaring the respondent vessel forfeited to the United States, with all costs to be assessed against claimant, the same being contrary to the law, and based upon suspicion only.

WHEREFORE, appellants pray that the Decree of the District Court of the United States for the Southern District of California be reversed and remanded with directions to proceed in accordance with the law.

H. Wm. Hess
H. WM. HESS
Proctor for Appellants

[Endorsed]: Filed Jul 26 1932 R. S. Zimmerman, Clerk By C. A. Simmons Deputy Clerk

[Title of Court and Cause.]

STIPULATION RE-RECORD AND PRINTING OF RECORD OF APPEAL

IT IS HEREBY STIPULATED by and between the UNITED STATES OF AMERICA, Libelant, and FALLON E. KIRK, Claimant and Respondent that the Libelant's Exhibit Numbers 1 to 9 inclusive and Respondent's Exhibit Numbered A to C inclusive, in the above-entitled action may be certified and transmitted by the Clerk of the United States District Court to the United States Circuit Court at San Francisco and may be used for all purposes on Appeal with the same force and effect as though they had been incorporated in the transcript of the record,

IT IS FURTHER STIPULATED THAT in the preparation of the Record on Appeal, that in all headings and documents and pleadings, in lieu of the full title of the COURT and CAUSE, the words "Title of Court and Cause" may be used, and the name of the document, and that all backs of all papers may be omitted except the Clerk's filing stamp, and omit all verifications, substituting therefor the word, "verified".

Samuel W. McNabb
SAMUEL W. McNABB
United States Attorney.

Frank M. Chichester
Assistant United States Atty.

H. Wm. Hess
Proctor for Respondent & Claimant

[Endorsed]: Filed Jul 26 1932 R. S. Zimmerman, Clerk By C. A. Simmons, Deputy Clerk

[Title of Court and Cause.]

SUBSTITUTION OF ATTORNEYS

We hereby nominate, substitute and appoint Wm. H. Hess, Esq. as our attorney in the above entitled cause in the place and stead of John B. Yakey.

F. E. Kirk

I hereby accept the above substitution

H. Wm. Hess

I hereby consent to the above substitution.

John B. Yakey

DATED: this 16th day of May, 1932

[Endorsed]: Filed June 7-1932 R. S. Zimmerman, Clerk by C. A. Simmons, Deputy Clerk

---

[Title of Court and Cause.]

NOTICE OF ASSOCIATION OF PROCTOR

NOTICE IS HEREBY GIVEN: THAT Stanley M. Doyle, Esq., of Glendive, Dawson County, Montana, is retained as Associate Proctor for the Appellant and Respondent, Fallon E Kirk, in the above-entitled matter.

H. WM. HESS

H. Wm. Hess

Proctor for Respondent.

[Endorsed]: Filed Oct 12 1932 R. S. Zimmerman, Clerk By Theodore Hocke, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

IN ADMIRALTY BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, F. E. Kirk, as Principal, and the LEXINGTON SURETY AND INDEMNITY COMPANY, a corporation duly organized under the laws of the State of New York and qualified for the purpose of making, guaranteeing or becoming sole surety upon bonds or undertakings required or authorized by the laws of the United States of America, as surety, are held and firmly bound unto the United States of America in the sum of TWO HUNDRED FIFTY DOLLARS ($250.00) covering costs and in the sum of ONE THOUSAND DOLLARS ($1000.00) covering stay of execution, lawful money of the United States of America to which payment well and truly to be made we bind ourselves and our heirs, executors and administrators and successors, jointly and severally, firmly by these presents.

WHEREAS, the said F. E. Kirk, claimant in the above entitled suit is about to take an appeal to the United States Circuit Court of the Ninth District to reverse an order or decree made, rendered and entered on the 31st day of May, 1932 by the District Court of the United States for the Southern District of California, Central Division, granting judgment against the claimant which decree orders THE AMERICAN GAS SCREW V-293 to be forfeited to the United States of America, and

WHEREAS, the said Claimant, F. E. Kirk, is desirous of staying the execution of said judgment so appealed from and it is further ordered by the said Court that

upon said F. E. Kirk filing a bond in the sum of TWO HUNDRED FIFTY DOLLARS ($250.00) covering costs and ONE THOUSAND DOLLARS ($1000.00) covering stay of execution with sufficient sureties and conditions as required by law, the same shall operate as a supersedeas of the said judgment and decree and shall suspend and stay all further proceedings of the said Court until the termination of the said appeal.

NOW, therefore, the conditions of the above obligation are such that if said Claimant, F. E. Kirk, shall prosecute said appeal to effect and answer all damages and costs if Claimant, F. E. Kirk, fail to make good his plea, then the above obligation to be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, said Principal and Surety have caused these presents to be duly signed and sealed at Los Angeles, California this 17th day of June, 1932.

F. E. Kirk

Examined and recommended for approval as provided in Rule 28.

H. Wm. Hess, Proctor.

LEXINGTON SURETY AND INDEMNITY COMPANY

[Seal] By Tom Cline, Attorney-in-Fact

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

On this day of Jun 17 1932 in the year one thousand nine hundred and ..... before me, AUGUST M. NARDONI, a Notary Public in and for the County of LOS ANGELES, personally appeared TOM CLINE

known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the LEXINGTON SURETY AND INDEMNITY Company, and acknowledged to me that he subscribed the name of the Lexington Surety and Indemnity Company thereto as principal, and his own name as Attorney-in-fact.

(Seal) August M. Nardoni
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Aug. 31, 1935

APPROVED this 17 day of June, 1932.

Hollzer
Judge

[Endorsed]: Filed Jun 17 1932 R. S. Zimmerman, Clerk By C. A. Simmons, Deputy Clerk

---

[TITLE OF COURT AND CAUSE.]

PRAECIPE FOR RECORD ON APPEAL

TO: THE CLERK OF SAID COURT

Please prepare the record and apostles on Appeal to be filed in this cause in the office of the Clerk of United States Circuit Court of Appeals for the Ninth Circuit and include therein the following:

(A) All those papers, documents and data required by Subdivision (1) Section (1) of Rule (4) of the Rules and Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit.

(B) All of the pleadings, together with the Exhibits annexed thereto in the above cause, all opinions of the Court on questions arising in said cause, findings of fact and conclusions of law in Interlocutory and Final Decrees, and other documents designated herein, said papers being as follows:

1. The Libel with Exhibits annexed thereto.
2. The pleadings of the Respondents or Claimants with the Exhibits annexed thereto.
3. Claims of Fallon E. Kirk and Eric Hogstrom.
4. The testimony as taken on the part of Libelant herein.
5. The testimony as taken on the part of Respondents or Claimants herein.
6. Substitution of Proctors.
7. The findings of fact and conclusions of law.
8. Petition for Appeal and assignment of errors.
9. Stipulation Re-Printing of Record on Appeal.
10. This Praecipe.
11. Original of Subpoena Duces Tecum and returns thereof.
12. Copies of all bonds, bail and otherwise filed herein.
13. Final Decree.

H. Wm. Hess
H. Wm. HESS
Proctor for Appellant.

[Endorsed]: Filed Jul 26, 1932 R. S. Zimmerman, Clerk By C. A. Simmons, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 154 pages, numbered from 1 to 154 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the libel; monition and return thereto; stipulations for costs; intervenor's petition and answer to libel; claim of F. L. Kirk; claim of Eric Hogstrom; subpoena *Duces Tecum* and return thereon; findings of fact and conclusions of law; final decree; reporter's transcript of testimony and proceedings on trial; notice of appeal; assignment of errors; stipulation *re* record and printing of record on appeal; substitution of attorneys; notice of association of proctor; bond on appeal and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of October, in the year of Our Lord One Thousand Nine Hundred and Thirty-two, and of our Independence the One Hundred and Fifty-seventh.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 6997

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

FALLON E. KIRK,
Claimant and Appellant,

vs.

UNITED STATES OF AMERICA,
Libelant and Appellee,

AMERICAN GAS SCREW V-293—Her Motors, Tackle, Apparel, Furniture, Etc., and ERIC HOGSTROM,
Respondent.

BRIEF FOR APPELLANT

H. WM. HESS,
STANLEY M. DOYLE,
Civic Center Building,
Los Angeles, California,
Proctors for Appellant.

Los Angeles Review, Law Printers, 120 So. Spring St., Los Angeles. TU 1377

SUBJECT INDEX

CITATIONS AND AUTHORITIES

In the

United States Circuit Court of Appeals

For the Ninth Circuit.

FALLON E. KIRK,
Claimant and Appellant,

vs.

UNITED STATES OF AMERICA,
Libelant and Appellee,

AMERICAN GAS SCREW V-293—Her Motors, Tackle, Apparel, Furniture, Etc., and ERIC HOGSTROM,
Respondent.

BRIEF FOR APPELLANT

Preliminary Statement

The Motor Vessel V-293 concerned herein is an undocumented American vessel of less than five net tons which was seized on the third day of March, 1932, while standing out to sea in Los Angeles outer harbor, by the United States Coast Guard. At the time of seizure, the Motor Vessel had a quantity of foodstuffs but no contraband of any nature. The United States thereafter filed a Libel of Information in the United States District Court, in

Emphasis ours wherever used.

the Southern District of California, Central Division, for the alleged violation of Section 4377 *Revised Statutes,* (46 U. S. C. A. 325), being the Statute providing for penalties for violation of license. The charterer and owner separately filed their answer and prayed that the Libel be dismissed.

The case was tried in Los Angeles before the Honorable Harry A. Hollzer, District Judge. The answers of the charterer and owner were denied and the vessel was ordered forfeited under the allegations and prayer of the Government. Thereafter Appeal was prayed for by the owner only and was allowed.

Opinions Below

The District Court rendered its findings of fact and conclusions of law which are found in the Transcript at pages 15-16-17 and entered its Final Decree of Condemnation, Forfeiture and Order of Disposition which will be found in the Transcript at pages 17-18-19.

Questions at Issue

The first question presented is whether or not the Motor Vessel herein falls within the purview of Section 4377 of *Revised Statutes* of the United States. As it is contended that this Motor Vessel was never licensed, and is a distinct exception to the license required and designated in the provisions of Section 4377.

Second, the question as to the violation of any law by a Vessel of this type while engaged in transporting goods gratuitously that were not contraband.

Third, the admission of incompetent and prejudicial evidence, both as to testimony and exhibits.

The final question as to whether or not the Appellant herein did not suffer confiscation of his property without due and legal process of law.

Statutes Involved

46 U. S. C. A. 325 (Section 4377 *Revised Statutes*) (Penalty for Violation of License):

> "Whenever any licensed Vessel is transferred, in whole or in part, to any person who is not at the time of such transfer a citizen of and resident within the United States, or is employed in any other trade than that for which it is licensed, or is found with a forged or altered license, or one granted for any other Vessel, such Vessel with her motors, tackle, apparel and furniture, and the cargo found on board her, shall be forfeited. But Vessels which may be licensed for the Mackerel Fishery shall not incur such forfeiture by engaging in catching Cod or fish of any other description whatever."

An Act to amend the laws for preventing collisions of Vessels and to regulate equipment of certain motor boats on navigable waters of the United States, approved June 9, 1910, and the regulation thereto appertaining from the office of the Secretary of the Department of Commerce, Bureau of Navigation Steam Boat Inspection Service, dated December 28, 1931, and known and designated as Department Circular No. 236 of the said Department of Commerce and quoting from paragraph No. 16 of the same:

> 16. "All motor boats of 5 net tons or over engaged in trade must be *documented;* that is to say, *licensed* by the collectors of customs. *Vessels under 5 net tons are not documented in any case.* The

license of the Vessel obtained from the collector of customs (designated a document) is additional to and must not be confounded with the license required for the operator of a motor boat."

The Fifth Amendment to the Original Constitution of the United States of America:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in the cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statement of Facts

The Motor Vessel V-293 which we shall hereafter refer to as the "Vessel" was built at Point Loma, California, at the instance, request and payment of the appellant herein.

The Vessel was commissioned for duty during October, 1931, and was at once chartered to one Eric Hogstrom of San Pedro, California, under Charter Agreement (Appellant's Exhibit B), page 74 of Transcript, after application for number to the Bureau of Navigation of the Department of Commerce had been requested and granted for an *undocumented* Vessel of LESS than five net tons, for the PRINCIPAL occupation of FISHING, copy

of original application being Appellee's Exhibit No. 9, appearing at page 70 of the Transcript.

From the time of Commission until the seizure the Vessel engaged in diversified vocations among them being Marine Motion Picture photography, knowledge of which fact is evidenced by the Appellee's subpoena duces tecum served on one Buck McGowan of Wilmington, California, requiring said McGowan to bring into Court three checks numbered 162, 242, 257, which checks represented the payment for use of the Vessel herein at sundry times and occasions and which subpoena duces tecum will be found at pages 13-14 of the Transcript.

Appellee, in order to support its Libel of Information wisely chose not to introduce the three checks mentioned herein into evidence.

This Vessel was seized by the United States Coast Guard Patrol Boat No. 257, on March 3, 1932, shortly prior to 6 A.M. while outbound in Los Angeles Outer Harbor. An immediate and thorough search resulted and no contraband or illegal goods of any kind or description was found, and no navigation rule or regulation was being violated; however, a quantity of foodstuffs designed and fit for human consumption was aboard the Vessel. (Transcript of Record, p. 39.)

At the time of trial the Government offered as its first witness, Commander Muller S. Hay in charge of Section Base No. 17 at San Pedro, California.

Commander Hay testified as to his receipt of Government Exhibit No. 1, from F. L. Austin of the United States Coast Guard at San Francisco, California, over strenuous objections of the respondent herein.

A brief comparison of the Government's Exhibit No. 1 and Respondent's Exhibit (C) plainly indicates that no similarity exists between the two exhibits, particularly as concerns the quantity of foodstuffs involved. Which fact is admitted by the Government on direct testimony of Stanley M. Megos which appears in the first paragraph of page 27 of the Transcript of Record.

Appellant directs attention to the admission of biased, prejudicial, incompetent evidence that is a part of this record and was of such a nature as to estop the appellant from enjoying his day in Court in the manner prescribed by the law.

Some examples of the evidence are found in the Transcript of Record at pages 41, 44, 45, 46, 47, 48 and 49; the entire testimony of Lieutenant John H. Fletcher, beginning at page 50 of the Transcript of the Record and continuing to page 58.

The entire testimony of Thomas Noland, beginning at the bottom of page 64, Transcript of Record, and continuing to the bottom of page 69.

Proctors for Government confused the question of the License of the Vessel involved herein by neglecting to show that although a license for fishing had been issued to the Vessel that it was in compliance with the Statutes of the State of California and was a California fishing license, rather than a Federal license (Bottom of page 37, Transcript of Record).

That upon conclusion of the trial, the Trial Court (Tr., pp. 141-142) made certain conclusions and statements and thereafter filed its Findings of Fact and Conclusions of Law which appear in Transcript of Record at pages 15, 16, 17, that thereafter the Court entered

its Decree, which appears at pages 17, 18 and 19 of the Transcript of the Record, wherein it ordered the forfeiture of the Vessel and from this, Appeal is taken and allowed.

Assignments of Error

The Appellant filed Assignments of Error which are found at pages 143, 144, 145, 146, 147, 148 of the Transcript:

I.

The District Court erred in finding and holding that all of the allegations of the libel are true.

II.

The District Court erred in finding and holding that all the denials set forth in the answer of the owner of the respondent vessel herein are untrue.

III.

The District Court erred in finding and holding that the allegations of paragraphs I and II of the affirmative defense in respondent charterer's answer are untrue.

IV.

The District Court erred in finding and holding that the allegations of paragraph I of the respondent owner of said Vessel are untrue.

V.

The District Court erred in finding and holding in paragraphs III and IV of the findings of fact that the respondent Vessel was engaged in trade other than that for which she was numbered and such finding of alleged fact is manifestly erroneous, obviously unsupported by the evidence and is the direct result of inference, conject-

ure and speculation resultant from the admission of incompetent, prejudicial and inadmissible evidence.

VI.

That the District Court erred in holding and finding in paragraph III of the findings of fact that respondent vessel was numbered SOLELY for fishing and for that the Government's Exhibit No. 9 which is a copy of the application clearly and definitely recites that the PRINCIPAL occupation will be fishing.

VII.

That the District Court erred in finding and holding that the said respondent vessel together with her motors, tackle, apparel and furniture was engaged in a trade other than that for which she was licensed or numbered in violation of Section 4377, *R. S.*, 46 U. S. C. A., 325, and that such conclusion No. 1 is against the law, and is wholly unsupported by the evidence and is clearly presumptive and arrived at from prejudicial inference.

VIII.

That the District Court erred in finding and holding that the owner of the respondent Vessel knew at the time of numbering or AT ANY OTHER TIME, that the respondent Vessel was to be used for purposes other than that for which she was numbered.

IX.

That the District Court erred in admitting for identification Government's Exhibit No. 1 and for that the same is not a public record and no foundation was even laid for its admission and that in reality and fact it is a confidential generalized circular to employees of a Government bureau, interposed in the instant matter for the

sole and only purpose of prejudicing the rights and property of the respondent herein.

X.

That the District Court erred in admitting to evidence any of the direct testimony of the Government witness Allen Loyal Lundberg and for that the entire chain of testimony neither serves to prove or disprove any material allegation contained in the libelant's Libel of Information but on the contrary goes in its entirety to a date, place and occurrence not germane to the issues herein and was inserted for prejudicial reasons only.

XI.

That the District Court erred in admitting to evidence, that part of the direct testimony of Government witness Lieut. John Hay Fletcher and for that the witness was permitted to testify as to conversations without the presence of respondents and is not binding upon the respondents herein as such evidence is clearly hearsay and contrary to the law.

XII.

That the District Court erred in admitting to evidence that part of the testimony of the Government witness Lieu. John Hay Fletcher and for that the witness was permitted over the objection of respondent's proctor to interpose an opinion and conclusion without qualification as concerned the mental and physical action and reaction of one of the respondent's witnesses.

XIII.

That the District Court erred in admitting any or all of the testimony of the Government witness, Thomas Noland, and for that all the evidence is incompetent and

speculative and purports to connect the respondent vessel and owner with an act and deed occurring in foreign waters on a prior date, far remote from the situs of the case at bar.

XIV.

That the District Court erred in not admonishing and cautioning the proctor for the libelant and for that the libelant's proctor throughout the entire presentation of this matter consistently and with design interposed inadmissible statements and inflammatory questions and observations of such a biased, prejudicial nature as to preclude respondents from their constitutional prerogative, namely, the right to a fair trial.

XV.

That the District Court erred in not dismissing the Libel and Costs.

XVI.

That the District Court erred in holding and finding that the Respondent vessel had deviated from its plotted course and for that the Respondent vessel was still within the confines of the zone of navigation of the harbor and due care and caution was and is required within such zone to avoid incoming vessels, debris, flotsam and jetsam of the waterfront, buoys and ground swells of the sea.

XVII.

The District Court erred in finding and holding that the respondent vessel was on or had any plotted course at the time of seizure and for that the respondent vessel was so closely contiguous and adjacent to the harbor and shore as to place such decision into the realm of speculation and theory and contrary to the law.

XVIII.

That the District Court erred in holding and finding that the Respondents or any of them, received or were to receive any consideration, emolument or monetary reward for the goods, wares and merchandise aboard the Respondent vessel and for that the uncontradicted affirmative evidence and all of it definitely establishes the contrary.

XIX.

That the District Court erred in holding and finding that the Respondent vessel was engaged or about to engage in an illegal venture and for that the evidence does not disclose any conspiracy of any kind, does not disclose any contact with any vessel at any time, for lawful purposes or otherwise; does not disclose any intention of contacting other vessels; does not disclose the ability of the Respondent vessel to withstand the perils and rigors of the high seas.

XX.

The District Court erred in holding and finding that the Respondent vessel came within the purview of the statute by virtue of which authority the libelant acquired the property of the respondent herein, contrary to law.

XXI.

The District Court erred in holding and finding that the Respondent herein forfeited his property, the Respondent vessel, to the Libelant, and for that, such holding and finding is directly contrary and opposed to both the letter and the spirit of Section One, Article Fourteen of the Constitution of the United States of America.

XXII.

The District Court erred in entering a Decree in favor of Libelant and against the respondent and predicating such Decree upon the lack of cohesion of the evidence of the Respondent's defense rather than the preponderance of proof of the libelant.

XXIII.

That the District Court erred in finding that a Decree be entered in this cause declaring the respondent vessel forfeited to the United States, with all costs to be assessed against claimant, the same being contrary to the law, and based upon suspicion only.

ARGUMENT

I.

Proceedings Under 46 U. S. C. A. 325 Not Applicable for Undocumented Motor Vessel of Less Than Five Net Tons.

A. The Language of the Statute, with the Subsequent Regulations does not Permit of this Construction.

Fitting the mosaic of facts in the instant cause to *Stephens vs. United States, The Russell,* 30 Fed. (2d) 286 (C. C. A. 5) the same basic elements are present, namely, a vessel of less than five net tons and undocumented. There, however, the analogy ends.

The F. H. Russell was an American Gas Motor boat of less than five net tons and was allotted the number A-829. She was thereafter seized with a *cargo* of *intoxicating liquor* and her tonnage increased from less than five net tons to 11.53 tons and when seized was NOT licensed.

The forfeiture of this vessel was decreed under 46 U. S. C. A. 325 because of two facts: first, she was not entitled to the benefit of that number by reason of net tonnage in excess of five tons, and for the further reason that she was subject to be licensed because of excessive tonnage and had she been licensed would have been then liable to forfeiture under Section 4377, *Revised Statutes.*

Appellant, however, submits that the V-293 was at the time of seizure of less than five net tons, was entitled to her number and was not possessed of contraband and was not violating any law or regulation of any nature.

B. What Constitutes Trading Under Section 4377 Revised Statutes?

In the case of *United States vs. The Paryntha Davis* (D. C. Me. 1858), 3 Ware 159, 27 Fed. Case No. 16003, the Court held:

> " * * * What constitutes trade or trading? The word 'Trade' is not here used to the restricted sense as equivalent to traffic but rather intended as equivalent to occupation, employment or business, for gain or profit * * *."

See also *The Swallow* (D. C. Me. 1882), Fed. Case No. 13066, holding that:

> "* * * The carrying of cattle from an island to the mainland in going out and returning when done gratuitously is NOT an act of trading."

See also, *The Willie G.* (1 Hash 253), Fed. Case No. 17762 (D. C. of Me. 1870), which holds that:

> "* * * The taking on board in a foreign port and bringing into this Country two barrels without hire

> or reward, but as a favor to a friend, supposed to contain crockery, but really containing liquors, is not engaging in trade within the meaning of Section 32 of the Act of February 18, 1793 (1 Stat. 316) and does NOT subject the vessel and cargo to forfeiture."

In view of the foregoing authorities and assuming the validity of the Government's broad major premise, which we do not, that a license is required, appellant still urges that the libel cannot be sustained as proof of any trading as herein defined upon the part of the V-293 is utterly absent and lacking.

Nor can it be established by soaring into the thin air of metaphysics and visualizing a boat, steaming a plotted course for fifteen hours from foreign waters, there to receive less than one third of invoice supposedly ordered by wireless, from the vessel of the appellant.

II.

The Court Erred in Admitting Incompetent and Prejudicial Evidence

Appellant will not presume upon the time of this Court to argue at length upon this question. Suffice to say that glaring and gross error inimical to the rights of the appellant occurred during the entire trial as is disclosed in the Transcript. See pages 41, 44, 45, 46, 47, 48 and 49, pages 50 to 58 and pages 64 to 69.

III.

Congress Intended That Vessels of this Type Were Entitled to Additional Protection if Within Required Tonnage and Free of Contraband.

From the acts of Congress and the subsequent regulations adopted by the Department of Commerce it is apparent that it was the intention to permit small vessels of this variety to engage in the several ventures essential to justification of investment and prescribed that a principal occupation be recorded, which in the instant cause was "FISHING."

Principal occupation means the major occupation which shall engage the vessel but does not limit to an *exclusive* occupation, for if this were true the Department of Commerce would have so required when application for number was made for the respondent vessel.

The Government is well aware of the diversity of this vessel's occupations as the subpoena duces tecum (pages 13-14 of Transcript) mutely but so powerfully bears silent witness.

Attention is respectfully directed also to the lack and absence of any prior overt or illegal act upon the part of the vessel.

We respectfully direct the attention of this Honorable Court to an address delivered by Mr. Chief Justice Hughes before the Federal Bar Association at Washington, D. C., on February 11, 1931, wherein the Honorable Chief Justice said in part as follows:

> "The solicitors in the various departments may render, and I believe are rendering, an important service in keeping down the volume of litigation by

not attempting to force statutes to an extreme construction * * *. There is abundant opportunity for good sense, even in administering laws."

In view of all the matters presented herein, appellant urges that he has been unlawfully and illegally deprived of his property, without due process of law.

Conclusion

The judgment of forfeiture of the Court below should be reversed and the libel dismissed.

Dated January 10th, 1933.

Respectfully submitted,

H. Wm. Hess,
Stanley M. Doyle,
Proctors for Appellant.

No. 6997.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Fallon E. Kirk,
Claimant and Appellant,

vs.

United States of America,
Libelant and Appellee,

American Gas Screw V-293, Her Motors, Tackle, Apparel, Furniture, etc., and Eric Hogstrom,
Respondent.

REPLY BRIEF OF APPELLEE.

SAMUEL W. MCNABB,
United States Attorney,
FRANK M. CHICHESTER,
Assistant U. S. Attorney,
Attorneys for Appellee.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

AUTHORITIES.

No. 6997.

IN THE

United States
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Respondent.

REPLY BRIEF OF APPELLEE.

STATEMENT OF FACTS.

The brief for appellant contains a preliminary statement, together with a statement of facts, and essentially the facts contained therein are correct. However, certain conclusions have been drawn in the statements which assume the very issues presented to this court and obviously we are unable to agree with these conclusions.

At page 1 of the brief for appellant the statement is made that the Respondent Vessel is an *undocumented vessel.* The question concerning the documentation of

this vessel is for this court to decide and we shall cite authorities supporting the contention of the appellee that the number, V-293, awarded to the Respondent Vessel constitutes a document.

On page 2 of the brief for appellant under the heading "Questions at Issue," paragraph two thereof, the assumption, in stating the second question at issue, that the Respondent Vessel was engaged in transporting goods gratuitously is not concurred in by the appellees.

At page 5 of the brief for appellant, in the latter part of the third paragraph, the statement is made "and no navigation rule or regulation was being violated;". In our opinion this is the very question at issue in this appeal and the mere statement of such a conclusion amounts to nothing more than an opinion on the part of the appellant.

And again on page 6 of the brief, paragraph one, the conclusion is drawn that no similarity exists between Government's Exhibit No. 1 (for identification) and Respondent's Exhibit "C." This conclusion may or may not be supported by reference to the exhibits. The further statement that the last mentioned conclusion is supported by the Government's witness is best evidenced by reference to page 27 of the transcript of record.

In brief the facts are as follows:

Commander Muller S. Hay received, in the ordinary course of government business, Government's Exhibit No. 1 for identification from his superior officer located in San Francisco. As the exhibit shows, a request by

radio was intercepted wherein certain supplies were requested to be delivered to the *"Algie,"* a British rum vessel, by some shore boat. Shortly after intercepting this message, United States Coast Guard Patrol Boat No. 257 overhauled the Respondent Vessel, *American Gas Screw V-293,* standing out of Los Angeles' outer harbor toward the north end of Catalina Island. The Respondent Vessel was a typical rum boat, painted a battleship gray and equipped with a 300 horse power Liberty motor.

Prior to the date of seizure, to-wit: March 3, 1932, she had been overhauled under suspicious circumstances and the odor of liquor had been noted by the boarding officer. When seized on March 3rd she had aboard a large quantity of supplies and foodstuffs, totalling about 1200 pounds. The total amount of supplies was about one-third of those called for on the list to be delivered to the *"Algie."* At the time of boarding the Respondent Vessel the explanation given by the master, Mr. Eric Hogstrom, concerning his destination and the amount of cargo aboard his vessel did not satisfy the Coast Guard's man and the vessel was seized and returned to the coast guard base.

Thereafter a libel was filed and the vessel was seized by the United States marshal for disposition pursuant to the further order of the court. The court determined that the vessel had become subject to forfeiture and its final decree of condemnation, forfeiture and order of disposition was entered on May 10, 1932, by the clerk.

ERRORS ASSIGNED BY APPELLANT.

ASSIGNMENT No. I:

This assignment has not been supported by argument or authorities in the appellant's brief and is dependent upon the final decision of the lower court in deciding the issues of the case.

ASSIGNMENT No. II:

This assignment is dependent upon the question of fact decided by the trial court in favor of the appellee and any error by the court in making its decision must be predicated upon all the facts in the case.

ASSIGNMENT No. III:

The claimant, Eric Hogstrom, is not a party to this appeal and the answer referred to in this assignment is not a part of the record, hence this assignment should be disregarded.

ASSIGNMENT No. IV:

Reference to page 9 of the transcript discloses that paragraph I of the answer of the appellant and owner of the vessel admits the allegations contained in paragraphs I and II of the libel. Thus any error based upon this admission becomes unintelligible and should be disregarded for that reason.

If Assignment No. IV refers to the affirmative defense set up by the appellant and owner of the vessel, then it too should be disregarded for the reason that a defense

based upon innocence or lack of knowledge on the part of an owner under the facts of the case at bar is not tenable.

Goldsmith-Grant Co. v. United States, 254 U. S. 505;

The Pilot (C. C. A. N. C. 1930), 43 F. (2d), 491;

The Mineola (C. C. A. Mass. 1927), 16 F (2d), 844;

The Esther M. Rendle (C. C. A. Mass. 1925), 7 F (2d) 545.

ASSIGNMENT No. V:

This assignment states the contents of Assignment No. XX and adds no new grounds upon which to base error other than that contained in Assignment No. XX. The argument of the appellee pertaining to this assignment will be covered in the argument pertaining to Assignment No. XX.

ASSIGNMENT No. VI:

Reference to paragraph III of the findings of fact will disclose that there was no finding that the Respondent Vessel was documented *solely* for fishing. The appellant cites no authorities to support his contention contained in this assignment that the Respondent Vessel could engage in other occupations than that named as its principal occupation.

Contrary to the contention contained in this assignment is the recent decision from the United States Supreme Court in the case of *United States v. The Ruth Mildred,* 286 U. S. 67.

In this case Mr. Justice Cardozo states, at page 69:

> "The 'Ruth Mildred' was licensed for the fishing trade and not for any other. She would have been subject to forfeiture if her cargo had been wheat or silk or sugar. In a suit under this statute, her guilt was not affected, was neither enlarged nor diminished, by the fact that the cargo happened to be one of intoxicating liquors. The Government made out a case of forfeiture when there was proof that the cargo was something other than fish."

ASSIGNMENT No. VII:

This assignment adds nothing to Assignments No. V and No. XX.

ASSIGNMENT No. VIII:

This assignment is controlled by the authorities cited in opposition to Assignment No. IV, *supra.*

ASSIGNMENT No. IX:

As will appear from the statement of this assignment, Government's Exhibit No. 1 was admitted *for identification* [Tr. 22]. The exhibit was never received in evidence for the reason that the court deemed the exhibit to be unnecessary and immaterial [Tr. 69].

At this time an exception was taken on the part of appellee to the court's ruling and, though no cross-appeal has been filed by the appellee in this matter, we respectfully urge that the said exhibit should have been received in evidence for the reasons set forth at the time of trial [Tr. 68-69].

ASSIGNMENTS NOS. X, XI, XII AND XIII:

We invite the court's attention to Rule II of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit:

> "* * * When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected."

Most of the testimony referred to in the above numbered assignments was not objected to at the time of trial nor was an exception taken by the appellant. The testimony to which an exception was taken is not set out in the assignment of errors as provided by Rule 11 and the rule further provides that when this is not done counsel will not be heard, except at the request of the court.

However, the testimony referred to is admissible for the purposes of showing probable cause for the institution of the Libel of Information.

The witness Lundberg testified that on February 28, 1932, four days prior to the seizure of the vessel, he caused her to be boarded and at that time he saw a well known rumrunner aboard the vessel and upon leaning into the pilot house of the Respondent Vessel he detected an odor of liquor. At that time the vessel was standing in the Los Angeles Harbor from seaward. The circumstances surrounding this boarding caused the Coast Guard's man to be suspicious of this vessel and this suspicion was a ground for probable cause for any subsequent boarding [Tr. 44-49].

The testimony of Lieutenant Fletcher was in further support of probable cause for the institution of the libel

proceedings in that his testimony disclosed a discrepancy in the statements of the master and the member of his crew, H. L. Johnstone, concerning the destination of the Respondent Vessel at the time of seizure.

According to the testimony of this witness the master, Eric Hogstrom, stated that he was bound for Santa Cruz Island. The witness further testified that Mr. Larsen, also known as H. L. Johnstone and referred to above, stated that they were going "to an island" [Tr. 50-51].

This witness testified that certain figures on a chart taken from the vessel indicated that the course of the vessel would bring it northwest off of Catalina Island. Such a course would be approximately 70° off the course for Santa Cruz Island [Tr. 62-63].

This witness further testified that no fishing gear was found aboard the vessel nor were any guns or ammunition found which might be used to hunt on the island as contended for by the appellant [Tr. 52].

This witness gave expert testimony respecting the construction of the vessel and his conclusion was that he had never seen a vessel of this type engaged in commercial fishing [Tr. 58].

The testimony of the witness Noland was material for the purpose of showing a probable contact by the Respondent Vessel with the British rum boat *"Algie."* This witness testified that on March 1st, two days prior to the seizure of the Respondent Vessel, he saw the *"Algie"* alongside a known rum ship taking aboard a cargo of intoxicating liquors [Tr. 65-67].

His testimony further disclosed that the *"Algie"* could make the run from its position 150 miles southeast of

San Clemente to that island in about 15 hours. From this testimony, and from the list of supplies contained in Government's Exhibit No. 1 for identification, the conclusion may be drawn that the *"Algie"* was to contact the *V-293* about March 3, 1932, for the purpose of taking on the supplies aboard the *V-293* and possibly transferring a cargo of liquor to the speedboat.

We make this observation not for the purpose of contending that these conclusions were proved by the evidence but for the purpose of supporting the suspicions of the Coast Guard's men when they boarded the Respondent Vessel on March 3rd. Such suspicions are sufficient to give the Coast Guard's men reasonable or probable cause for seizing the Respondent Vessel and they are further grounds to show probable cause for the institution of the action at bar.

> "* * * 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation; and in all cases of seizure, has a fixed and well known meaning. It imports a seizure made under circumstances which warrant suspicion."
>
> *Locke v. United States,* 11 U. S. 337 at 347;
>
> *The Thompson,* 70 U. S. 155 at 162.

> "* * * Probable cause must, in this connection, mean reasonable ground of presumption, that the charge is, or may be, well founded;
>
> * * * * * * * * *
>
> "* * * The 71st section of the Act of 1799 declares, that, 'in actions, suits or informations to be brought, where any seizure shall be made pursuant to this act, if the property be claimed by any person, in

every such case, the *onus probandi* shall lie upon such claimant;' and it is afterwards added, 'but the *onus probandi* shall lie on the claimant, only where probable cause is shown for the prosecution, *to be judged of by the court before whom the prosecution is had.*" (Last thirteen words in italics ours.)

Wood v. United States, 41 U. S. 341 at 366.

The above quotations were taken from the opinion of Mr. Justice Story wherein certain cloth was forfeited for violation of the Customs Laws.

Section 615 of the Tariff Act of 1930 provides as follows:

"Burden of Proof in Forfeiture Proceedings. In all suits or actions brought for the forfeiture of any vessel, vehicle, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, merchandise, or baggage, because of violation of any such law, the burden of proof shall be upon the defendant: *Provided,* That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court. (June 17, 1930, c. 497, Title IV, § 615, 46 Stat. 757.)"

19 U. S. C. A. 1615.

The procedure provided for in the above quoted section has been held to apply to violations of the navigation laws

and particularly to section 4377 R. S., 46 U. S. C. A. 325, now under consideration.

The Chiquita, 41 F. (2d) 842; affirmed in 44 F. (2d) 302 (C. C. A. 9);

United States v. Davidson, 50 F. (2d) 517 at 521 (C. C. A. 1);

Jackman v. United States, 56 F. (2d) 358 at 360 (C. C. A. 1).

It is our contention, therefore, that if probable cause for the institution of the Libel of Information, to be judged of by the court, is shown then the burden of proving that no violation was committed shifts to the claimant.

It is our further contention that the decision by the trial court respecting the showing of probable cause is conclusive unless on appeal it is shown that the trial court made its finding without any substantial evidence to support that finding. It should be noted in this appeal that the question of probable cause, as found by the trial court, has not been raised.

That the decision of the court is final in this regard is supported by the following:

> "* * * The question, whether there was probable or reasonable cause for the seizure, constituted no part of the issue to be tried by the jury. So far as it respected throwing the *onus probandi* upon the claimants, it was a matter solely for the consideration of the court in the progress of the trial, and collateral to the main inquiry, although of great importance in regulating the nature and extent and sufficiency of the evidence."
>
> *Taylor, et al. v. United States,* 44 U. S. 197 at 206.

And the court further says, at page 211:

> "The main exception however to the charge is as to the ruling of the judge that there was probable cause of seizure, and that, therefore, the *onus probandi* to establish the innocence of the importation, and to repel the supposed forfeiture, was upon the claimants. We entirely concur in the opinion of the judge, in his views of the evidence as applicable to this point. He, and not the jury, was to judge whether there was probable cause or not to throw the *onus probandi* on the claimants; for the 71st section of the act of 1799, chap. 128, expressly declares that 'the *onus probandi* shall lie on the claimant only where probable cause is shown for such prosecution, to be judged of by the court before whom such prosecution is to be had.'"

Buckley v. United States, 45 U. S. 250 at 259 following *Taylor v. United States,* (*supra*).

In the following case certain lots of feathers were imported. The feathers contained in lots one and two were imported contrary to law. The feathers contained in lots one and two were forfeited to the government and the feathers contained in lot three were given to the claimant. Both parties appealed and the question of probable cause is discussed by the Circuit Court. This question arose under a statute similar to section 615 of the Tariff Act of 1930, and the court said:

> "* * * If there was probable cause for the seizure, the burden of proving the legality of importation was upon the claimant, who was possessed of the goods. If, in the opinion of the court, at the end of the government's proof, there was not enough evi-

dence to go to the jury, then there was not such probable cause as to put the burden of proof upon the claimant." (Page 303.)

The court further states, at page 304 respecting the finality of the trial court's decision as to probable cause, as follows:

> "We have no expression of the district judge as to what evidence persuaded him to the conclusions he arrived at, but we shall assume he applied the rule of evidence above referred to. No exception to any ruling of the district judge in this record squarely presents the question argued by the libelant as to the shifting of the requirement or burden of proof to the claimant. We believe the district judge to whom the facts were presented may well have found a want of probable cause after considering the libelant's proofs, and thus not required the claimant to offer evidence or explanation to show his legitimate possession. The finding of the district judge is as conclusive upon us as would be the verdict of the jury, were the question decided by a jury in the case."
>
> *U. S. v. One Bag of Paradise, etc., Feathers,* 256 Fed. 301.

ASSIGNMENT No. XIV:

This assignment in effect charges misconduct on the part of the Assistant United States Attorney presenting the case at the trial. Again it should be noted that no specific charge is made, pursuant to Rule 11 of the Rules of this court, nor is the charge supported by anything stated in the brief of the appellant.

ASSIGNMENTS Nos. XV, XVI, XVII, XVIII, XIX, XXI, XXII and XXIII:

The assignments numbered above pertain entirely to the weight of the evidence as disclosed at the trial. When the burden of proof shifts, as heretofore set forth, the claimant is required to go forward with the proof of showing that he was innocent of any wrongdoing pertaining to the violation set forth in the Libel of Information. If he fails in this proof then the decision of the court must go against him as it did in the case at bar.

In the final analysis of the evidence upon which the above numbered assignments are based, the contention of the appellant is that the court should have believed the appellant and his witnesses and should have disbelieved the witnesses who testified for the Government.

> "* * * When questions of fact are dependent upon conflicting evidence, the decision of the trial judge, who had the opportunity of seeing the witnesses and judging their appearance, manner and credibility, will not be reversed unless it clearly appears that the decision is against the evidence." Manual of Federal Appellate Procedure by Paul P. O'Brien, page 206.

The Alijandro (C. C. A. 9), 56 F. 621, 624;

The Hardy (C. C. A. 9), 229 F. 985;

Sorenson v. Alaska S. S. Co. (C. C. A. 9), 247 F. 294;

The Beaver (C. C. A. 9), 253 F. 312;

The Mazatlan (C. C. A. 9), 287 F. 873;

The West Keats (C. C. A. 9), 20 F. (2d) 508;

Siciliano v. California Sea Products Co., 44 F. (2d) 784 (C. C. A. 9).

Respecting the weight of the evidence we have these few observations to make which are in addition to the conclusions of the trial court who listened to the witnesses, saw their manner of testifying, and drew its conclusions as to the truth or falsity of their testimony.

At page 85 of the transcript the appellant testified that he had fished while on the Respondent Vessel around vacation time in the summer of 1931. At page 97 of the transcript the appellant testified that the machinery wasn't put into the vessel so that it would work until October, 1931. At page 4 of the appellant's brief the statement is made that the vessel was not commissioned until October of 1931. Obviously October is not in the summer of 1931 and it is difficult to reconcile the two statements of the appellant.

The testimony of this witness further disclosed [Tr. 96] that the building of the vessel was started in March of 1931 and that it was completed in October of 1931. He stated that the vessel was built primarily for fishing [Tr. 74] and that his purpose in building it was to make money [Tr. 79]. He invested approximately $4,500.00 in the vessel [Tr. 74] and chartered the vessel to Eric Hogstrom for $300.00 per month [Tr. 79]. He saw Hogstrom twice from October, 1931, until February, 1932 [Tr. 86], and received no money whatsoever in payment for the use of the vessel during this period of time [Tr. 87].

This type of testimony standing alone, and without seeing the witness testify and thus noting his manner of testifying, is sufficient to warrant its disbelief.

The decision of the court discloses that this testimony, together with the testimony of Eric Hogstrom was not believed by the court. The observations of the court, contained at page 141 and 142 of the transcript, reflect its opinion regarding the defense.

ASSIGNMENT No. XX:

The alleged error complained of in this assignment is the same error as that complained of in Assignment No. V and our argument is intended to cover both assignments.

The statute upon which the forfeiture was declared is set forth on page 3 of the brief for appellant as section 4377 R. S. (46 U. S. C. A. 325). The appellant has not cited any authorities to support his contention that the provisions of the above named statute are not applicable to a vessel operating under a number issued by the Collector of Customs pursuant to the Act of Congress of June 7, 1918, c. 93, sections 1, 2, 3, 4, 5; 40 Stat. 602; (46 U. S. C. A. 288).

The only authority cited by the appellant, viz. *The F. H. Russell,* 30 F. (2d) 286, is an authority in favor of the contentions of the appellee. Forfeiture in the last mentioned case was decreed under section 4189 R. S. (46 U. S. C. A. 60), but the court held that the number allotted to a vessel is to be considered a record or document granted in lieu of a certificate of registry, enrollment, or license. Such a numbered vessel is not authorized to be employed in trade, foreign or coasting.

Respecting the meaning of the word trade the following statement is enlightening:

> "* * * The unexplained fact that a vessel licensed to be employed in the coasting trade was at

sea, with a cargo of merchandise aboard, is enough to show that she was employed in trade."

Le Bouef et al. v. United States, 30 F. (2d) 394.

The following recent decisions have all decreed a forfeiture of the respondent vessels for violation of their licenses and in each case it will be noted that the vessel was a numbered vessel:

Ford v. Kline (V-2793), 42 F. (2d) 558;
The K-3696, 36 F. (2d) 430;
The K-5691, 50 F. (2d) 180;
The K-1231, 54 F. (2d) 502.

In the case of *Ford v. Kline* it should be noted that the vessel was a motor boat authorized to be used and enjoyed for livelihood purposes only within the jurisdiction of the United States. This case cited *The F. H. Russell, supra,* and held, at page 559, that the number allotted to the vessel is to be considered a record or document granted in lieu of a certificate of registry, enrollment or license.

In the case of *The K-3696* the vessel was licensed as a party and work boat.

In *The K-5961* the principal occupation of the vessel, which appeared upon the registration certificate, was given as "pleasure."

In *The K-1231* the certificate of registration stated that the principal occupation of the vessel was for pleasure and forfeiture was decreed for a violation of the license.

The last mentioned case was approved in the case of *United States v. The Ruth Mildred,* 286 U. S. 67, and the question of trading was further settled in the last

mentioned case when it was held that the presence of a cargo aboard the vessel other than fish would be grounds for forfeiture.

From these cases it appears to be conclusive that section 4377, R. S., applies to a vessel operating with a number as well as to a licensed vessel. We have been unable to find any authority holding to the contrary. It should be noted that section 325 and section 288 of Title 46, U. S. C., are in chapter 12 of the code entitled: "REGULATION OF VESSELS IN DOMESTIC COMMERCE."

Hence it is the logical conclusion that the penalties prescribed in section 325 are applicable to all vessels included within chapter 12. Any exceptions to the penalties as set forth in section 325 are set out in chapter 12. Section 336 of Title 46, U. S. C., excepts canal boats or boats employed on the internal waters or canals of any state from the penalties of section 325. Section 335 of Title 46 excepts lighters or a boat not masted from the provisions of chapter 12. In view of these specific exceptions it appears that if it had been the intention of Congress to except small boats, operating with a number obtained from the collector of customs, such exception would appear in the chapter.

A brief reference may be made to the authorities cited by the appellant at page 13 of his brief.

We have carefully scrutinized the case of the *United States v. The Paryntha Davis,* Fed. Case No. 16003, and we have been unable to find the language quoted in the brief.

The cases of *The Swallow* and *The Willie G* refer to a transportation as a gratuitous act and are not material in deciding the issues in this case in view of the finding of the trial court that the transportation of the foodstuffs involved herein was an act of trading.

In that regard we invite the court's attention to the following decisions wherein it is held that a single act of trading is sufficient upon which to decree a forfeiture of the vessel for the violation of its license:

The sloop *Active,* a vessel licensed for the fishing trade, was laden, in the night of July 4, 1808, in the port of New London, and was seized by the revenue officer, after having left the wharf, without a clearance, under circumstances which justified a belief that she was about to proceed on a foreign voyage. The charges were a violation of the acts laying an embargo and a violation of the vessel's license.

The vessel was held to be forfeited for the violation of her license.

The Active, 11 U. S. 99, at 105.

In deciding the following case Judge Fox, of the District Court of Maine, held that a single act of trading was sufficient to cause a forfeiture for the violation of the license. At page 528 he states the following:

> "In the various cases which have been before the district and circuit courts for a violation of this provision, it has been uniformly held that a single act of trading not authorized by a license would subject the vessel to forfeiture. It is claimed in defence, that the trade or employment for which the vessel is licensed must be abandoned, and that for the time

being she must be exclusively employed in the unauthorized trade, in order to subject her to forfeiture. Such a construction does not meet with the approval of the court. If adopted it would eventually annul and defeat this provision of the act. If it is sanctioned, a vessel licensed for the fisheries might pursue in part that employment, and as occasion offered in the course of her fishing voyages engage in smuggling operations, and thus the mischief would prosper which the law intended to punish. A vessel in the course of her voyage may pursue two employments, one legal, the other unauthorized, and be subject to the penalties of the law for the consequences of her illegal employment."

The Ocean Bride, Federal Case No. 10,404, 18 Federal Cases 526, at 528-9.

The following cases are in support of those cited above respecting this point:

The Two Friends, Federal Case No. 14,289, 24 Federal Cases 433, at 434;

United States v. The Paryntha Davis, Federal Case No. 16,004, 27 Federal Cases 456, at 457.

The suggestion has been made by the appellant that incompetent and prejudicial evidence was admitted at the time of the trial. We submit that assuming the contention of the appellant to be correct, which we do not admit as a matter of fact, the authorities are unanimous in holding that the reception of inadmissible evidence is not reversible error where there is competent evidence otherwise to sustain the conclusions of the sitting justice.

Alksne v. United States, 39 F. (2d) 62, at 69.

Of course, the reason for this ruling is that the Court of Admiralty sits without a jury and evidence which might prejudice a jury should not affect the sitting justice.

At page 15 of his brief the appellant contends that numbered vessels were intended by Congress to engage in several ventures essential to justification of investment. In other words the appellant contends that numbered vessels were intended to engage in various kinds of commerce and trade, including the business of fishing. Such a construction has not been given by the courts to this statute and *The F. H. Russell, supra,* holds squarely that a numbered vessel shall engage in no trade. In our opinion this case is conclusive of the appellant's argument in that regard.

CONCLUSION.

We submit that the ultimate facts to be concluded from all the testimony, as set forth in the transcript, together with the law applicable to these facts, as construed by the courts, support the forfeiture of the Respondent Vessel as decreed by the District Court and that no reversible error appears in the record.

Respectfully submitted,

SAMUEL W. MCNABB,
United States Attorney,

FRANK M. CHICHESTER,
Assistant U. S. Attorney,

Attorneys for Appellee.

6998

United States
Circuit Court of Appeals
For the Ninth Circuit

TONY PANZICH and JOHN ARKO,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

United States
Circuit Court of Appeals
For the Ninth Circuit

TONY PANZICH and JOHN ARKO,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

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UNITED STATES OF AMERICA, SS:

To United States of America, and to Samuel W. McNabb, United States Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 24 day of June, A. D. 1932, pursuant to an order allowing appeal filed May 23, 1932 in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action entitled United States of America, plaintiff, vs. Tony Panzich, et al, wherein Tony Panzich and John Arko are appellants and you are appellee to show cause, if any there be, why the judgments and sentences in the said action mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable George Cosgrave United States District Judge for the Southern District of California, this 25 day of May, A. D. 1932, and of the Independence of the United States, the one hundred and fifty-sixth

GEO. COSGRAVE

U. S. District Judge for the Southern District of California

[Endorsed on back:]

In the United States Circuit Court of Appeals for the Ninth Circuit

Tony Panzich and John Arko, Appellants vs. United States of America, Appellee.

CITATION

Copy rec'd May 25, 1932 Milo E. Rowell, Assistant U. S. Atty. FILED May 25, 1932 R. S. ZIMMERMAN, CLERK, by G. J. Murphy, Deputy Clerk

No. 10454-J Filed June 3, 1931

Viol: Section 37 of the Federal Penal Code—Conspiracy to violate National Prohibition Act.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

At a stated term of said court, begun and holden at the City of Los Angeles, County of Los Angeles, within and for the Central Division of the Southern District of California on the first Monday of February in the year of our Lord one thousand nine hundred thirty-one:

The grand jurors for the United States of America, impaneled and sworn in the Central Division of the Southern District of California, and inquiring for the Southern District of California, upon their oath present:

That

TONY PANZICH
NICK JURASH
JOE N. WILSON
JOHN ARKO and
TONY GOVARKO

hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the grand jurors unknown, each late of the Central Division of the Southern District of California, heretofore, to-wit: prior to the dates of the commission of the overt acts hereinafter set forth, and continuously thereafter to and including the date of finding and presentation of this indictment, in the County of Los Angeles, state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did then

and there knowingly, wilfully, unlawfully, corruptly and feloniously conspire, combine, confederate, arrange and agree together and with each other and with divers other persons whose names are to the grand jurors unknown, to commit, in the said County of Los Angeles, state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, an offense against the United States of America and the laws thereof, the offense being to violate Title II of an Act of Congress of the United States approved October 28, 1919, commonly known and designated as the National Prohibition Act, that is to say, that they, the said defendants, would thereupon unlawfully and in violation of Section 3, Title II of the said Act sell and possess large quantities of intoxicating liquor, all of which should then and there be fit and for use for beverage purposes and all of which should contain more than one-half of one per cent of alcohol by volume, neither of said defendants then and there having, nor intending thereafter to have, a permit so to do from the Director of Prohibition, Department of Justice, or the Commissioner of Industrial Alcohol, Treasury Department of the United States, or any other proper officer of the United States then and there authorized to issue such permits.

And the grand jurors aforesaid, upon their oath aforesaid, do further charge and present that at the hereinafter stated times, in pursuance of, and in furtherance of, in execution of, and for the purpose of carrying out and to effect the object, design and purposes of said conspiracy, combination, confederation and agreement aforesaid, the hereinafter named defendants did commit the following overt acts in the City of Santa Monica, County of Los Angeles, in the state,

division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court:

1. That on or about the 30th day of April, 1931, defendant John Arko sold one (1) pint of whiskey to S. W. Brooks at Santa Monica, California.

2. That on or about the 4th day of May, 1931, defendant Tony Govarko sold one (1) pint of whiskey to H. S. Casey at Santa Monica, California.

3. That on or about the 13th day of May, 1931, defendant Nick Jurash sold one (1) pint of whiskey to H. S. Casey at Santa Monica, California.

4. That on or about the 13th day of May, 1931, defendant Nick Jurash sold one (1) quart of wine to H. S. Casey at Santa Monica, California.

5. That on or about the 15th day of May, 1931, defendant Joe N. Wilson sold one (1) pint of whiskey to H. S. Casey at Santa Monica, California.

6. That on or about the 15th day of May, 1931, defendant Tony Panzich possessed one (1) quart bottle approximately three-fourths (3/4) full of wine at Santa Monica, California.

7. That on or about the 15th day of May, 1931, defendant Tony Panzich possessed one (1) pint of whiskey at Santa Monica, California.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

SAMUEL W. McNABB,
United States Attorney,
Harry Graham Balter
Assistant United States
Attorney

Endorsed on back: No. 10454-J United States vs. Tony

Panzich, Nick Jurash, Joe N. Wilson, John Arko and Tony Govarko

Indictment Violation Section 37 Federal Penal Code —Conspiracy to violate National Prohibition Act

FILED: June 3, 1931 R. S. ZIMMERMAN, CLERK,
By.....Deputy Clerk

Panzich $3,000.
others 2,000.

At a stated term, to wit: The February Term, A. D. 1931, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 22nd day of June, in the year of our Lord one thousand nine hundred and thirty-one

Present:

The Honorable Wm P. James, District Judge.

United States of America,	)	
Plaintiff,	)	No. 10454-J Crim.
vs	)	
Tony Panzich,	)	
Nick Jurash,	)	
Joe N. Wilson,	)	
John Arko and	)	
Tony Govarko,	)	
Defendants.	)	

This cause coming before the Court for arraignment and plea of defendants Tony Panzich, Nick Jurash, Joe N. Wilson, John Arko and Tony Govarko; M. E. Rowell, Assistant United States Attorney, appearing as counsel for the Government, and the said defendants

being present in court, in propria persona, are informed of the Indictment herein by the Clerk of the Court, and each of the said defendants having thereupon stated his true name to be as given therein, now enters his plea of not guilty; whereupon, it is by the Court ordered that this cause be continued to September 14th, 1931, for setting for trial of the said defendants.

At a stated term, to wit: The February Term, A. D., 1932, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Thursday, the 19 day of May in the year of our Lord One thousand nine hundred and thirty-two.

Present:

The Honorable Geo Cosgrove . District Judge.

United States of America,	)	
Plaintiff,	)	No. 10454-J-Crim
vs	)	
Tony Panzich,	)	
Nick Jurash,	)	
Joe N. Wilson,	)	
John Arko,	)	
Tony Govarko,	)	
Defendants.	)	

This cause coming on for trial of defendants Tony Panzich, Nick Jurash, Joe N. Wilson, John Arko, and Tony Govarko; Milo E. Rowell, Assistant United States Attorney, appearing as counsel for the Government and Russell Graham, Esq., for the defendants, who are present; and Henry W. Mahan being present as the stenographic reporter of testimony and proceed-

ings; at 10:11 o'clock a. m., court convenes in this cause, and it is by the Court ordered this trial be proceeded with, and that a jury be impaneled, and thereupon,

The names of twelve jurors are drawn and called, being as follows, to-wit: Chas. B. Barnes, Curt R. Besser, Henry S. Williams, George L. Robbins, Jno. C. Mertz, Carl Giles Firmin, Philip Wiseman, Fred R. Bannard, R. G. MacFie, Rex Anglin, Arthur G. McKinnon and Walter L. Pearson.

The twelve jurors, whose names were called, take their places in the jury box, and are by the court examined for cause; Rex Anglin and Curt R. Besser are excused for cause, and it is thereupon by the Court ordered two more names be called from the list of jurors; whereupon,

Two more names are called, being the names of Fred S. King and Willard Warne; and the said jurors whose names were just called, take their places in the jury box, and are by the court and Russell Graham, Esq., examined for cause; Philip Wiseman is by Russell Graham, Esq., challenged for cause, and it is by the court ordered the challenge of the said Russell Graham, Esq., is denied, but the said Philip Wiseman is by the Court excused upon a peremptory challenge by the said Russell Graham, Esq., for the defendant, and it is ordered another name be drawn; whereupon,

The name of Roy W. Moore is called; and the said Roy W. Moore, having taken his place in the jury box, is by the Court and by Russell Graham, Esq., examined for cause, and Chas. B. Barnes is by the Court excused on defendants' peremptory challenge, and it is ordered another name be drawn; whereupon,

The name of Sylvester Pier Robbins is called; and

the said Sylvester Pier Robbins, having taken his place in the jury box, is by the Court and by Russell Graham, Esq., examined for cause, and Carl Giles Firmin is by the Court excused on defendants' peremptory challenge, and it is ordered another name be drawn, whereupon,

The name of Alfred W. Hill is called; and the said Alfred W. Hill, having taken his place in the jury box, is by the Court, by Milo E. Rowell and Russell Graham, Esq., examined for cause; and thereupon

The said jurors now in the jury box having been passed for cause, and there being no further peremptory challenge by the defendants or challenge by the Government, the said jurors are accepted as the jury to try this cause, and are sworn in a body; the same being as follows, to wit:

THE JURY

Sylvester Pier Robbins	Roy W. Moore
Fred S. King	Fred R. Bannard
Henry S. Williams	R. G. MacFie
George L. Robbins	Willard Warne
Jno. C. Mertz	Arthur G. McKinnon
Alfred W. Hill	Walter L. Pearson

Milo E. Rowell, Esq., makes the opening statement to the jury for the Government, and Russell Graham, Esq,. reserves his opening statement; and thereafter

S. W. Brooks is called and sworn and testifies for the Government on direct examination conducted by Milo E. Rowell, Esq., is cross-examined by Russell Graham, Esq., redirect examined by Milo E. Rowell, Esq., and is examined by the Court and recross-examined by Russell Graham, Esq., and there is offered and admitted in evidence

Gov't's Ex. 1: 1/2 pint 4/5ths full of liquor

and there are offered and marked for identification

Gov't's Ex. 2: for ident.: 1/2 pint bottle of liquor, 1/2 full

" " 3: " " 1/2 pint bottle of liquor, about 3/4's full

and offered and admitted in evidence

Govt's Ex. 4: 3 receipts of "Good Fellows Inn," for $5.40, $8.15, and $4.50 respectively

and thereupon

At 11:07 o'clock a. m., recess is declared for a period of ten minutes.

At 11:22 o'clock a. m., court reconvenes, all being present as before, and it is ordered trial proceed, and there are offered and marked for identification

Gov't's Ex. 5, for ident.: 1/2 pint bottle of liquor

" " 6, " " : Pint bottle of liquor

" " 7, " " : Quart bottle of liquor

Homer F. Casey is called and sworn and testifies for the Government on direct examination conducted by Milo E. Rowell, Esq., and is examined by the Court; following which there is offered and admitted in evidence

Gov't's Ex. 8: Receipt of "Good Fellows Inn"

and thereupon

At 12:13 p. m. o'clock, the jury are by the Court admonished, and a recess is declared to 2:00 o'clock p. m. today.

At 2:10 o'clock p. m., court reconvenes, and all being present as before, Harry J. Waite, is called and sworn and testifies for the Government on direct, examination conducted by Milo E. Rowell, Esq., and is cross-examined by Russell Graham, Esq.;

Thomas Robinson is called and sworn and testifies for the Government on direct examination conducted by Milo E. Rowell, Esq., but is not cross-examined and there are offered and admitted in evidence

Gov't's Ex. : 9: lease dated 7/31/30 between Santa Monica Lodge No. 906, etc. and Tony Panzich

" " 10: 2 corporation grant deeds, each to "John Arkovich", et al

and thereafter

Earl G. Bleak is called and sworn and testifies for the Government on direct examination conducted by Milo E. Rowell, Esq., and the said E. Bleak having not been cross examined, there are offered and admitted in evidence at this time

Gov't's Exs. 2, 3, and 5

which were heretofore marked for identification, and there is also offered, but not admitted in evidence, Government's Exhibit 6, which was heretofore marked for identification; and thereupon

At 2:37 o'clock p. m., Government rests;

The jury are by the Court excused at the request of Russell Graham, Esq., and retire from the court room, and the said Russell Graham, Esq., moves for a directed verdict of not guilty as to each defendant, and argues in support thereof; Milo E. Rowell, Esq., argues in opposition thereto, and Russell Graham, Esq., having argued further, the said motion is thereupon by the Court denied, and an exception noted; and thereafter

At 2:55 o'clock p. m., a recess is declared for a period of five minutes.

At 3:06 o'clock p. m., court reconvenes, all being present as before, including the jury, and

Nick Jurash, defendant, is called and sworn and tes-

tifies for defendants on direct examination conducted by Russell Graham, Esq., and is cross-examined by Milo E. Rowell, Esq.;

R. B. Restovich is called and sworn and testifies for the defendants on direct examination conducted by Russell Graham, Esq., is cross examined by Milo E. Rowell, Esq., and redirect examined by Russell Graham, Esq.;

Mrs. Katie Jurash is called and sworn and testifies for the defendants on direct examination conducted by Russell Graham, Esq., but is not cross-examined;

Miss Lena Jurash is called and sworn and testifies for the defendants on direct examination conducted by Russell Graham, Esq., but is not cross-examined;

John Muhn is called and sworn and testifies for the defendants on direct examination conducted by Russell Graham, Esq., but is not cross-examined; and thereupon

At 3:33 o'clock p. m., recess is declared for a period of ten minutes.

At 3:58 o'clock p. m., court reconvenes, and all being present as before, including the jury,

Joseph N. Wilson, defendant, is called and sworn and testifies for the defendants on direct examination conducted by Russell Graham, Esq., and is cross-examined by Milo E. Rowell, Esq., redirect examined by Russell Graham, Esq., is examined by the Court, and redirect examined by Russell Graham, Esq.; and thereupon

At 4:20 o'clock p. m., the jury are told to remember the admonishment, and a recess is declared to the hour of 10 o'clock a. m. May 20, 1932.

At a stated term, to wit: The February Term, A. D. 1932, of the District Court of the United States of

America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 20 day of May, in the year of our Lord one thousand nine hundred and thirty-two

Present:

The Honorable Geo. Cosgrave, District Judge.

United States of America,	)	
Plaintiff,	)	No. 10,454-J—Crim
vs	)	
Tony Panzich,	)	
Nick Jurash,		
Joe N. Wilson,	)	
John Arko,		
Tony Govarko,	)	
Defendants.	)	

This cause coming on for further trial of defendants Tony Panzich, Nick Jurash, Joe N. Wilson, John Arko, and Tony Govarko; Milo E. Rowell, Assistant United States Attorney, appearing as counsel for the Government and Russell Graham, Esq., for defendants, who are present; and Henry W. Mahan being present as stenographic reporter of testimony and proceedings; at 10:05 o'clock a. m., court reconvenes in this cause, and the jury being present, the court orders trial proceed, and

Martin Miklauschutz is sworn as an interpreter of the Slavonian language, and, thru said interpreter,

Tony Govarko, defendant, is called and sworn and testifies for the defendants on direct examination conducted by Russel Graham, Esq., and through said interpreter is cross-examined by Milo E. Rowell, Esq., and redirect examined by Russell Graham, Esq.; following which

William M. Austin is called and sworn and testifies for the defendants on direct examination conducted by Russell Graham, Esq., and is cross-examined by Milo E. Rowell, Esq., and examined by the Court;

Joseph Pablovich is called and sworn and testifies for the defendants on direct examination conducted by Russell Graham, Esq.;

Winfield Husted is called and sworn and testifies for the defendants on direct examination conducted by Russell Graham, Esq., but is not cross-examined;

John Arko, defendant, whose true name is John Arkovich, is called and sworn and testifies for the defendants on direct examination conducted by Russell Graham, Esq., and is cross-examined by Milo E. Rowell, Esq., and thereafter

At 11:00 o'clock a. m., recess is declared for a period of ten minutes.

At 11:12 o'clock a. m., court reconvenes, and all being present as before, Defendants rest; motions which were heretofore made on the part of the defendants for an instructed verdict, and which the defendants state they are willing to submit without argument, are renewed, at this time; and thereupon the said motions are denied, and exception noted; following which

Harry J. Waite, heretofore sworn, resumes the stand in rebuttal, and testifies on direct examination conducted by Milo E. Rowell, Esq., is cross-examined by Russell Graham, and redirect examined by Milo E. Rowell, Esq.;

S. W. Brooks is called in rebuttal and testifies on direct examination conducted by Milo E. Rowell, Esq., and is cross-examined by Russell Graham, Esq.;

Lawrence H. McDonald, called in rebuttal, is sworn and testifies on direct examination conducted by Milo

E. Rowell, Esq., and is cross-examined by Russell Graham, Esq.; and there is offered and admitted in evidence

Gov't's Ex. 6, for ident.: Bottle of liquor

heretofore marked for identification; and thereupon

At 11:33 o'clock a. m., Government rests; Russell Graham, Esq., renews again his previous motions, and the said motions are again by the Court denied, and exception noted; and thereafter

At 11:35 o'clock a. m., Milo E. Rowell, Esq., argues to the jury, and Russell Graham, Esq., argues to the jury for the defendants; and

At 12:05 o'clock p. m. recess is declared until 2:00 o'clock p. m. today.

On motion of Milo E. Rowell, Esq., it is by the Court ordered Government's Exhibits 9 and 10 may be withdrawn and returned to the Elks Club at Santa Monica upon the substituting of copies therefor.

At 2:05 o'clock p. m., court reconvenes, and all being present as before, including the jury, Milo E. Rowell, Esq., argues to the jury for the Government, and Russell Graham, Esq., argues for the defendants;

At 2:22 o'clock p. m., the Court instructs the jury on the law applicable to this case; Russell Graham, Esq., suggests further instruction which is given; and, at 2:50 o'clock p. m., Olcott S. Bulkly is sworn as the bailiff to care for the jury, and the jury retire to deliberate upon a verdict; and thereupon a recess is declared until the jury return into Court.

At 3:25 o'clock p. m., court reconvenes, all being present as before, and the verdict of the jury is presented by the foreman of the jury, and read in open court by the clerk, and is by the court ordered filed and entered; the same, as presented and read, being as follows, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

United States of America, Plaintiff, vs Tony Panzich, Nick Jurash, Joe N. Wilson, John Arko and Tony Govarko, Defendants, No. 10454-J—Crim. We, the jury, in the above entitled cause, find the defendant Tony Panzich guilty as charged in the indictment; and the defendant, Nick Jurash, not guilty as charged in the indictment; and the defendant Joe N. Wilson guilty as charged in the indictment; and the defendant John Arko guilty as charged in the indictment; and the defendant, Tony Govarko not guilty as charged in the indictment. Los Angeles, California, May 20, 1932. Walter L. Pearson, Foreman of the Jury. Filed: May 20, 1932, R. S. Zimmerman, Clerk, by Francis E. Cross, Deputy Clerk.

The verdict as aforesaid having been returned by the jury, the Court discharges the jury from further consideration of this cause; and since the jurors composing this jury are members of the panel of Judge James' Court, they are excused at this time to report for further attendance in the court room of Judge James at 10 o'clock a. m., May 27, 1932; and it is by the Court ordered this cause be continued to Monday, May 23, 1932, for pronouncement of sentence upon the defendants found guilty; and it is ordered bonds of such defendants remain in effect, and the bonds of defendants found not guilty be exonerated and they are released.

On motion of M. E. Rowell, Esq., liquor exhibits are by the Court ordered returned to the Prohibition Department; and thereupon Government's Exhibits 1, 2, 3, 5, 6, and 7 are accordingly returned, and a receipt

obtained therefor, which is placed on the file cover; and thereafter

At 3:30 o'clock p. m. a recess is declared until tomorrow at 9:30 o'clock a. m.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
VS	)	No. 10,454-J Crim.
TONY PANZICH, Nick Jurash, JOE N. WILSON, JOHN ARKO and TONY GOVARKO, Defendants.	)	

VERDICT

We, the jury in the above entitled cause, find the defendant, TONY PANZICH,

guilty as charged in the indictment; and the defendant, NICK JURASH,

not guilty as charged in the indictment; and the defendant, JOE N. WILSON,

guilty as charged in the indictment; and the defendant, JOHN ARKO,

guilty as charged in the indictment; and the defendant, TONY GOVARKO,

not guilty as charged in the indictment.

Los Angeles, California, May 20, 1932.

WALTER L. PEARSON
Foreman of the Jury

FILED:
May 20, 1932
R. S. ZIMMERMAN, CLERK,
By Francis E. Cross, Deputy Clerk.

At a stated term, to-wit: the February term A. D. 1932 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the court room thereof, in the City of Los Angeles, on Monday, the 23d day of May in the year of our Lord nineteen hundred and thirty-two.

Present:

The Honorable George Cosgrave, District Judge.

UNITED STATES OF AMERICA, Plaintiff,	)	
VS	)	No. 10454-J Crim.
TONY PANZICH, et al, Defendants.	)	

This cause coming on for pronouncement of sentence upon defendants, Tony Panzich, Joe N. Wilson and John Arko; Gwyn S. Redwine and Milo E. Rowell, Assistant United States Attorneys, appearing as counsel for the government and Russell Graham, Esq. for the defendants, all of whom are present; whereupon, a statement having been made by the Court, it is by the Court ordered that imposition of sentence as to defendant Joe N. Wilson be postponed at this time, and said defendant placed on probation for a period of three years on condition he refrain in all respects from transgressing any law, particularly relating to liquor, and that he report once a month in writing during the aforesaid period of probation, and further ordered that if said defendant violates any law, sentence will be pronounced; and thereafter the court pronounces sentence upon defendants Tony Panzich and John Arko for the crime of which they stand con-

victed, namely, violation of section 37 of the Federal Penal Code—conspiracy to violate the National Prohibition Act,—and it is the judgment of the court that defendant Tony Panzich be committed to the Federal penitentiary at McNeil Island, Washington, for the term and period of two years, and that he pay unto the United States of America a fine in the sum of $5,000.00, and stand committed to the said penitentiary until said fine shall have been paid; and it is the judgment of the court that defendant John Arko be committed to the Federal penitentiary at McNeil Island, Washington, for the term and period of two years and that he pay unto the United States of America a fine in the sum of $1,000.00, and stand committed to the said penitentiary until said fine shall have been paid.

It is by the court ordered defendants Tony Panzich and John Arko be remanded to custody; and that the bond on appeal of the two said defendants be fixed in the sum of $10,000.00 each.

(81/185)

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION
HON. GEORGE COSGRAVE, JUDGE PRESIDING

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	NO. 10454-J
VS	)	CRIMINAL
TONY PANZICH and	)	
JOHN ARKO,	)	
Defendants.	)	

BILL OF EXCEPTIONS ON BEHALF OF TONY PANZICH AND JOHN ARKO

Be it remembered that at a stated term of court, begun on Monday, the 1st day of February, 1932, the grand jurors of the United States returned into this court a certain indictment charging the defendants, Tony Panzich and John Arko and others with the offense of conspiracy to violate Title II of the National Prohibition Act by selling and possessing intoxicating liquors.

And said defendants thereafter pleaded not guilty and thereupon issue was joined. And afterwards, to-wit, at a session of said court, held in the City of Los Angeles, California, before the Honorable George Cosgrave, Judge of said court, on the 19th day of May, 1932, the aforesaid issues between the parties came on to be tried before a jury of said court for that purpose duly empaneled.

At this stage came as well the government and said defendants with their respective attorneys, to-wit, Milo Rowell, Esq., Assistant United States Attorney repre-

senting the plaintiff, and Russell Graham, Esq., representing the defendants.

Whereupon, the following proceedings were had.

EXCEPTION NO. I.

THE CLERK: United States vs Tony Panzich, Nick Jurash, Joe N. Wilson, John Arko and Tono Govarko.

MR. GRAHAM: The defendants are ready and are present in court.

THE COURT: Very well.

THE CLERK: Will the defendants step forward?

MR. GRAHAM: But I don't want their names called, to have them step forward, because there may be a question of identity, and I don't think it would be fair. I assure the Court they are all here.

THE COURT: Well, what is the idea?

MR. GRAHAM: If it becomes necessary for any Government witness to point out which defendant is which defendant, I don't think they should have that done for them by the clerk before they have to do it.

THE COURT: Well, let the defendants take their places in the regular way, and we will decide it in the regular way when we get to it.

MR. GRAHAM: Those are all of the defendants and they are all present.

THE COURT: Proceed.

THE CLERK: May I call the roll, your Honor?

THE COURT: Yes.

THE CLERK: This is Judge James' jury.

THE COURT: Yes.

(Clerk calls roll of the jury.)

THE COURT: Fill the box.

(Whereupon twelve jurors took their seats in the jury box)

THE COURT: The case this morning, gentlemen, is an indictment against Tony Panzich. Stand please.

MR. GRAHAM: If the Court please, before this is done, I would like to ask if the Government witnesses are in the room?

THE COURT: Well, I don't know. He will stand if he is present.

(The defendant Tony Panzich arises).

MR. GRAHAM: Let the record show that I object to this procedure, and note an exception.

THE COURT: Yes.

Nick Jurash, Joe N. Wilson, John Arko and Tony Govarko.

(The foregoing named defendants arose.)

THE COURT: That's sufficient. Sit down, gentlemen.

(All defendants became seated).

THE COURT: Those are the defendants.

(Whereupon a jury of twelve men was duly empaneled, after examination by the Court and counsel, and said jury was duly sworn).

After the indictment was read, the pleas of not guilty stated, and the opening statement made by the United States Attorney, the following proceedings were had:

PLAINTIFF'S EVIDENCE.

S. W. BROOKS

a witness on behalf of the Government testified as follows:

DIRECT EXAMINATION

BY MR. ROWELL:

My full name is S. W. Brooks. My occupation is Federal Prohibition Agent, at which I have been engaged for two years. I was acting in the capacity of a federal prohibition agent during the months of April

and May, 1931. I know of certain premises in the City of Santa Monica known as Tony's Goodfellows Inn. I was first there on April 30, 1931. I had three companions on that trip. I don't know who they were. One was a person who came into the office and arranged to take me out there. I don't know who brought it up, and we met two other parties in Santa Monica before we went to the premises. I didn't know any of them. I had never known any of them and I have not seen them subsequent to that time. I entered and was introduced to Mr. Panzich just after getting inside the cafe. The informant that came into the office and agreed to take me out introduced me. Two of my companions were women and one was a man. After I was introduced to the defendant, Panzich I was escorted to a booth in the place by a man at that time known to me as Kelly, whom I later found out to be John Arko. He took me to a booth and closed the curtains and asked us what we wanted and I ordered a pint of whiskey from Mr. Arko. I ordered the whiskey first, but Mr. Arko didn't take the order for the food. Another waiter took the order for the food. Mr. Arko only took the order for the liquor. After I gave that order, Arko went away and in about two minutes returned with a pint of whiskey. After the whiskey was delivered to me by Mr. Arko I drank one glass of it and retained the other part. The bottle which I bought from the defendant Arko on April 30 for the price of $2.00 I can identify by my signature and identification mark. After I left the premises and took the bottle with me, I delivered it to the government chemist, Mr. Stribling. (At this stage of the proceedings it was stipulated by and between counsel that if Mr. Stribling were called to the stand he would testify and that he may be deemed to have testified, that he is the Government chemist, and that

the bottle mentioned by the witness was turned over to him by this witness and that he, Mr. Stribling had the possession of it since that time and that the contents were the same as they were when he first received it from the witness and also that Mr. Stribling would testify that he examined the contents and that it contained 43.63 per cent alcohol by volume and that in his opinion it was fit for beverage purposes). (Whereupon the bottle was introduced in evidence as Government's Exhibit I). Subsequent to the delivery to me by Arko of the bottle, Government's Exhibit I, I retained the bottle and took it away with me that night after paying the bill, and on this bill that the waiter gave me was an item at the bottom of the bill, initialing the item, calling it "B. R. K.", and then putting opposite that "B. R. K.", the amount of the cost of the liquor item, $2.00. I had purchased other things there that evening and they were listed on that statement. Everything was on the same statement, computed at the top, and down at the bottom was "B. R. K.", $2.00. I paid the bill. The next time I went to these premises was May 4, in company with Federal Agent Casey. We were taken to a booth in the same manner by the waiter known to me now as Nick Jurash, and after being in the booth, Agent Casey ordered some liquor, and he delivered a pint of whiskey which he paid for later. There were two of them there and I don't recall which one took Casey's order for this liquor. It seems to me that the defendant Jurash—Jurash and Arko, known to us at that time as Kelly—were there at that time. In about two minutes' time Arko returned with the pint of whiskey and handed it to Mr. Casey. We drank one glass of it and the rest was retained. We also ordered food that evening. We received a statement for the food in the same manner, with the food itemized at the top, and the

liquor itemized at the bottom as "B. R. K.". A charge of $2.00 was placed after the item "B. R. K." Later I seized from Panzich a number of statements that he had in his cash register, and all the statements that he had in there were "B. R. K.", $2.00", "B. R. K., $3.00", or "B. R. K., $5.00". This bottle was the bottle Casey purchased on May 4th, the one I have just testified in regard to. I have my signature and identification in my own hand writing on the bottle. I don't know to whom this bottle was delivered subsequent to its having been taken from the premises known as Tony's Goodfellows Inn. It was placed in Agent Casey's charge and Agent Casey took it to the Government warehouse. (Whereupon the bottle was marked

Government's Exhibit 2 for identification).

I went there again on May 13th, accompanied by Agent Casey. We were escorted to a booth in the same manner, and a waiter came and took our orders for food, and Agent Casey ordered a pint of liquor and after the liquor was delivered, then Casey ordered a bottle of wine and that was delivered. I couldn't testify as to who those people were who delivered the pint of liquor on the 13th. Arko, known to us as Kelly, delivered to us a quart of wine. The liquor was retained by Agent Casey. We drank a glass of it or a part of a glass. Aside from the wine and whiskey, on May 13th, we ordered food. We received a statement for the food. It itemized the food we had purchased from the Inn and also two items "B. R. K." and then the wine was itemized but I don't recall how. The charge was $2.00 for the whiskey and $2.50 for the wine. It was paid for by Agent Casey. This is the bottle of whiskey which was bought by Agent Casey on the 13th of May and my identification initials are on it. Agent Casey took the bottle to the Government warehouse. I didn't accom-

pany him but saw him leave the office. (Whereupon the bottle was marked Government's Exhibit 3 for identification). I went to the premises again on May 15th, accompanied by Agents Casey, Waite, Clemens, McDonald and Banta. Agents Casey and Waite first entered the premises. Agent Clemens and myself entered about thirty minutes later. When Clemens and I entered the defendants Panzich, Arko, Govarko, Jurash, Wilson and Mrs. Panzich were present. Agents Casey and Waite at the time of our entrance had placed the defendant Wilson under arrest when we entered and we then placed Mr. Panzich and the other defendants under arrest. We had warrants for arrest. I didn't place them under arrest. The deputy United States marshal who accompanied us took them into custody. We had warrants of arrest and search warrants and made a search under the authority of the search warrants. We found a bottle of wine in the safe. Mr. Panzich opened the safe and got a bottle of wine out, and Agent Casey found a bottle of whiskey in the back part of the cafe. Apparently the safe was locked when Mr. Panzich went to the safe. I observed him open it by means of a combination. He twisted the dial on the safe. We searched the cafe part and found no other intoxicants on the premises besides this pint of whiskey and bottle of wine. We took some little bills with identification "B. R. K." on them. We took some of those. I am unable to identify them as my identification mark isn't on it. I can identify these slips of paper. They are statements of "B. R. K." and so forth. They were found in the—I couldn't distinguish them correctly—but I found some of them in the cash register. I think those initialed were taken out of the cash register by Mr. Panzich and myself. (Whereupon the slips were introduced as Government's Exhibit 4). There was no

bottle of wine purchased on the occasion of May 15th. The bottle of wine was found on that date.

CROSS EXAMINATION

BY MR. GRAHAM:

I don't know who the waiter was who waited on us the first time I was there on April 30th. One of these defendants was there at the time, but this defendant was not a waiter. He didn't take the part of a waiter. There was another waiter there besides Mr. Arko. On the first trip that I made there I saw the defendants Panzich, Arko and Govarko. (Whereupon in response to questions by counsel for defendants the witness identified each of the defendants). I don't recall seeing Jurash there on April 30th. Govarko came to our table that night but he is not the one who served us with what we got. He was dressed about like he is now. He didn't have on a waiter's uniform. Some of the waiters' had on waiter's uniforms but Arko or Govarko never did, that I saw. There is only one waiter I can identify that did. There is only one other waiter that I know of that isn't a defendant in the case. When I got my bill for what we had on April 30th the items of food were itemized at the top of the bill but I don't recall if every piece of food was itemized or not, but the items were at the top, "B. R. K." at the top, or food at the middle of the page. I don't mean they segregated it in that manner. On one occasion the food might have been at the top and on the next occasion at the bottom. I don't recall on this particular occasion but it was separated from the food. On that occasion I don't remember whether we had a complete dinner or a sandwich. The first time we was there about 7:30 P. M. I don't recall what we had to eat or how much the bill was. I am pretty sure on the first trip I had a sandwich. My ex-

pense account would show how much I spent but I haven't refreshed my recollection by looking at it. I have refreshed my recollection by looking at the notes as to the first occasion. I did that before trial this morning. Those notes don't tell how much I spent in the cafe. That is on a separate record. I don't know the name of the man who took me there and introduced me. It was a woman and not a man. I didn't even ask her her name. She gave me some fictitious name. They never give correct names. I don't remember it. I didn't make any effort to find out who it was or where she lived. I was assigned to her through the office. I do not know whether she was paid for going down there. I don't know the names of the two men who were along or the other woman. I don't know the names of either of the people I met that night and I didn't make any effort at all to find out their names or addresses. The next time I was there was May 4th. I have refreshed my recollection as to the dates. I made notes as to the exact dates shortly after the incidents happened. I made a record of the trips. To the best of my knowledge those dates are correct. I made the notes the same date the incidents happened. For instance, I made a note May 4th, so and so and so and so happened and I am testifying from my best recollection because I haven't those dates with me here. I looked at them this morning. On May 4th, I don't remember who was the first man I saw when I went into the place. There were quite a few people there. The first man I spoke to was a man known to me as Kelly—Mr. Arko. (In response to the question "Didn't you tell us on direct examination that you were met as you went inside by Nick Jurash and that he conducted you to a booth, the witness answered "You asked me who I spoke to".) I first spoke to Arko. I don't remember what happened

then. We were taken to a booth and one waiter—(in response to the question: "you testified on direct examination it was Nick Jurash, was it, or somebody you don't remember who it was," the witness answered: "to the best of my recollection it was Jurash." (At this stage of the proceedings three bottles concerning which there had yet been no testimony were marked respectively Governments Exhibits 5, 6 and 7 for identification).

On May 4th we first went to the premises at 6:30 P. M. Agent Casey and Agent Casey's wife were with me. This was not the first time I saw Kelly. The first man I spoke to on entering was the defendant Arko or Kelly. Then Nick Jurash conducted us to a booth. I am not sure on that night whether it was Jurash or another waiter who actually waited on our table. Agent Casey purchased a pint of whiskey there in my presence on that night. He got it from Arko. If I remember correctly, he ordered it from the waiter and Arko delivered it to him. I don't know who the waiter was. That pint of whiskey is all the liquor we ordered that night. I don't recall the amount of the bill. Casey paid the bill. I saw the check but did not read it. He handed it to Agent Casey. I saw him hand it to Agent Casey and paid no further attention to the bill. This cafe was a completely equipped restaurant. It sold food, almost any kind of food you wanted to order. I don't know anything about the stock, the equipment was there. Any kind of food you ordered you always got and there was quite a considerable selection on the menu. As I recall, it was very good food. The next time I went there was on the 13th of May and I went there with Agent Casey and Mrs. Casey. We got there about 6:30 P. M. I don't remember who the first person was that I spoke to after entering the cafe that time. We saw Arko and

Govarko and Jurash on the 13th. I don't remember whether I saw Mr. Govarko on May 4th or not. I am positive that I did see him on April 30th. I don't remember whether I saw Mr. Govarko on May 4th or not, but I did see him on the 13th and also Jurash. I don't think I saw Jurash on the 30th of April. One gentleman waited on me. I did see Jurash on the 4th and 13th and he waited on me on the 13th. He wore a waiter's uniform. On the 13th, Agent Casey ordered a pint of whiskey and it happened to be Jurash that night. He took the order for the whiskey as well as for the food. The whiskey was ordered first and then Mr. Govarko brought the whiskey on May 13th. All three ordered dinner and Agent Casey paid the bill. I looked at the bill but don't know how much it was. Its in the records but not on my expense account. In the notes as to what happened I made no note as to the amount of that bill. On the 15th of May we got there about 8:00 P. M., myself and the other prohibition agents and we took with us a Deputy United States Marshal and we had with us both a warrant for the arrest of these men and a search warrant. The deputy marshal had the warrant for the arrest and I had the search warrant. I am not sure but I think I signed the affidavit upon which the warrant of arrest was issued. The warrant might not have named these defendants definitely, their names might have not been known to us definitely at that time. I couldn't say unless I saw the warrant. I didn't know the full names of these defendants. I am sure we probably knew their first names and fictitious names. We got their names by questioning them afterwards. We had enough of the name, part of the name, before they were arrested. Arko gave me a fictitious name the first trip I went there. He said his name was Kelly. He did not at that time tell me what his full name was. After

we arrested him and I asked him his name he gave it to me. After he told me, I regarded Kelly as his nick name. I heard others call him Kelly and I know that his nickname was Kelly. I did not hear the men in the cafe call him Kelly. I heard a person inside call him Kelly. He said this is Kelly and after that I called him Kelly. I don't recall that I heard anybody else call him Kelly. Govarko said his name was Tony. I don't know whether that is a fictitious name. I notice in the indictment his name is given as Tony Govarko. I don't know that I would consider that simply his first name.

EXAMINATION BY THE COURT

When I used the words fictitious names I meant nicknames; Arko going under the name of Kelly and Govarko as Tony. Panzich's name is Tony. There were apparently two Tony's at the place. My first meeting with Panzich was on April 30th and that was the case with all of the other defendants. The reason I came to examine this place in the first place was that a complaint came into our office and I was sent out by our office. I am on the regular detail of the prohibition service and regularly in that service for two years. In pursuance to my duties, I went out to secure evidence against this place. On my first visit, May 15th, I had a search warrant. That is about the story.

FURTHER CROSS EXAMINATION

BY MR. GRAHAM:

Up until the time of arrest when I asked these defendants their names, I didn't know the full names of any of them, except Panzich. I personally made the search of this place after the arrest in company with the other agents. I personally assisted in the search. I didn't find the whiskey or see it found. I personally

found the bottle of wine in the safe. I made an examination of it at that tmie. The quart of wine which Agent Casey bought there in the cafe when I was in the same party was apparently consumed on the premises. In other words, we drank it with our dinner.

REDIRECT EXAMINATION

BY MR. ROWELL:

I tasted the bottle of wine that we seized that night from the safe. I have been on the prohibition service for over two years. In the course of my duties it has been incumbent upon me to determine whether or not beverages contain alcohol in excess of one half of one per cent. Ever since the beginning in the service I have had occasion to taste wines and liquors and see if they were alcoholic. (In response to the question "and would you say in view of your experience that the wine taken from the safe that night, did or did not contain over one half of one per cent of alcohol by volume" the witness answered "The only thing I could say is it tasted like wine"). It was palatable. On two occasions, April 30th and May 15th, I saw Panzich on those premises when I was there. On the occasions when I did order dinner and liquor the money given in payment of the bill was given to the waiter. We couldn't see what he did with it. He would take it with the bill and leave the table and return with the change.

EXAMINATION BY THE COURT

Wilson was arrested on the 15th. That was my first meeting with Wilson. On the 15th is the only time I saw Wilson. When I saw Wilson, Agents Casey and Waite had him under arrest and had brought him out into the dining room.

RE CROSS EXAMINATION

BY MR. GRAHAM:

That wine was red wine. I couldn't tell by the taste. My experience as a prohibition agent has not taught me to distinguish between the different kinds of wine. I tested it by tasting it, but I could not tell you whether it was sweet or sour. I don't remember that.

HOMER F. CASEY

a witness on behalf of the plaintiff testified as follows:

DIRECT EXAMINATION

BY MR. ROWELL:

I am a prohibition agent and have been in the service about four years. I went to certain premises in Santa Monica known as Tony's Goodfellows Inn. The first time I went there was May 4, 1931. Mr. Brooks and my wife were with me. On arriving at those premises we were shown to a booth, and were seated, and gave an order for some food. As I recall, it was Mr. Govarko who conducted us to a booth, and as he seated us, Mr. Kelly spoke to Mr. Brooks, spoke to us rather. A man known to me as Kelly—Mr. Brooks later introduced him as Mr. Kelly—was present at that time. After we placed our order for the food, we ordered some—the waiter to the best of my recollection was Mr. Govarko. We ordered a pint of whiskey and he said, "All right". He walked away and that is when we met Kelly. He came over to the booth and we repeated our order to him/ I was introduced to him. I don't remember the name they gave for me. It wasn't Casey, some name, and we shook hands and I told him I wanted to get a pint and he said "All right". In a few minutes he came back with a pint of whiskey—the man known as Arko

or Arkovitch. Arko it is here. He delivered that to us personally. Walked into the booth and sat it down on the table. After that occurred we had our food and finally called for a bill and the waiter gave us the bill. To my recollection it was Govarko and at the top was whatever the meal was, whatever food we had, and "B. R. K." at the bottom. I don't necessarily mean right on the bottom of the bill, but below the food. The price of the liquor showed as though it could have been food. This "B. R. K." was made as an entry as though it could have been food, and then in the item column where the price should be was $2.00. We also had a conversation about the price. That was when I had made the order for the liquor. He told me there were various prices for the liquor and I told him I wanted the $2.00 liquor. He said some was $2.00 and they had Bourbon for $5.00 and I told him I would take the $2.00, that I think I couldn't afford the $5.00 liquor. I paid the amount of the bill to the waiter who served the food. Outside of leaving the booth with the money, I don't know what he did with the money; he came back later with my change.

I have seen the bottle which is government's Exhibit 2 for identification. That is the bottle I purchased on May 4, 1931. After I left the premises it was turned over to the warehouse. It was in my possession from the time it was taken from the Goodfellows Inn to the time it was turned over to the warehouse. The contents were the same as they were when I had received the bottle from the Goodfellows Inn. The next time I visited the premises was on May 13th accompanied by the same parties. When we went into the premises Nick Jurash conducted us to a booth, and I don't recall whether we saw Kelly at that time or not, but we later

ordered a pint of whiskey and Mr. Kelly came to the booth. After we had ordered the whiskey. I mean Arko. Mr. Arko came to the booth, and we ordered a pint of whiskey and also a quart bottle of wine. We ordered the whiskey and as Mr. Arko brought that we ordered the wine from Mr. Arko. He returned to the table and opened the bottle. We also had food served to us on the premises. We received a statement for our food and other purchases. Other than a charge for the food was listed on that statement $2.00 for the liquor and $2.50 for the wine. The bottle which is Government Exhibit 3 for identification is the bottle of whiskey I purchased on May 13, 1931. At the time we left the cafe it was in my possession. I locked it in my personal locker until I took it to the warehouse of the prohibition department. During the time it was in my possession the contents of the bottle were not changed in any manner. We paid the waiter on the evening of May 13th. I don't know what he did with the money. He took the bill and the money and brought back my change. The next time I went to those premises was on May 15th accompanied by Agent Waite and my wife. After we went into the premises, Wilson showed us to a seat in the booth, and we were seated, and we ordered some wine, or some whiskey, and Mr. Arko came in. Wilson showed us to a seat and we ordered some whiskey and Mr. Arko came in and returned with the whiskey and then Mr. Wilson had served us with the food, and after we were through eating I paid him and expected him to go to the cash register, but he didn't go. He took the money out of his pocket to make my change and counted my change out on the table, and when he did I immediately placed him under arrest and seated him in the booth. Prior to paying, I had taken the

numbers off of the bills. I expected him to go to the cash register, but thats the only time he didn't leave my table. After that Waite and I recovered the money. We compared it with the numbers we had written down. It was the same. I do not have that money now. Agent Waite took the money and if I took anything else I don't recall it at this time. Waite took the money which I had just paid him which we had marked. When we called for the bill, it was arranged that my wife would get up and leave the premises and that was the signal for the other prohibition agents to come in. Agents Clements and McDonald and Agent Brooks was outside, and another gentleman by the name of Banta, and there might have been some more, I don't know. After we placed Wilson under arrest the premises were searched and Agent Brooks came in with a Deputy United States Marshal and in the back of the premises in a bin we found several empty bottles and cases for whiskey bottles and in one of these bins we found the pint of liquor practically full. These intoxicants I saw. A bottle, Government's Exhibit 5 for identification, is the bottle which I purchased the night I arrested Wilson. That bottle was in my custody from the time it was purchased from Wilson and later turned over to the Government warehouse. It was in my custody from the time it was received from Wilson until it was turned over to the warehouse. During the time it was in my possession there was no change made in the contents of the bottle. The bottle, Government Exhibit 6 for identification, is the bottle I found in the bin in the side of the building at the Goodfellows Inn. I retained it in my possession until I turned it over to the warehouse, the custodian of the Prohibition Department. From the time I first took that bottle into my possession until I

turned it over to the warehouse there was no change made in the contents of the bottle. It was in my possession all of the time between those two times.

I can identify this piece of paper by my initials at the bottom of it. I received it on the night of May 15, 1931 from Wilson. That was taken from Wilson immediately after his arrest. That is the bill which he presented to me which I called for immediately preceding his arrest. (The bill was then introduced as Government's exhibit 8). Agent Waite and I recovered that from him. Government's Exhibit 8 was read by Mr. Rowell as follows:

"Goodfellows Inn, Elks Club Building. 3003 Main Street. Ocean Park, California. 2 R. Pash - at a price of 70 cents; 1 Banana 35 cents; 1 B. R. K. $2.00; 2 coffee 10 cents; total $3.15. Please pay waiter. If not satisfied, please report to manager". (Mr. Rowell then stated that the word "pash" he couldn't make it out. Maybe your Honor could).

EXAMINATION BY THE COURT

I first went there in April and was introduced first to Arko. I was admitted to the booth by Govarko and we placed our order with him for the pint of whiskey and he sent Arko to us. That is the whiskey which was brought to us by Arko. That is about what happened on the 4th. I went again on the 13th, and placed that order for liquor first with Jurash and then Mr. Arko came to us and got the order. He was the second man to receive that order and it was brought to us by Arko. We paid Jurash, the waiter who served us the food and then on the 15th when the arrest took place. I was sold the liquor by Arko and paid Mr. Wilson. Wilson had first taken the order for the liquor, and apparently the only

thing I could understand about it is that I placed my order for liquor with Wilson and he sent the man to me who brought the liquor and then he received the money for it. He collected for it. That was on the 15th. I don't recall seeing Wilson on the 4th or 13th. In brief, that is my story.

EXCEPTION NO. II.

Cross Examination

BY MR. GRAHAM:

Q Mr. Casey, you were present in the court room this morning, seated on the other side, outside the rail, when the court called the names of these defendants and had each defendant stand up as their names were called?

A I walked in as that was going on.

Q You were seated there?

A No, I walked in.

Q And while the names were being called and each defendant stood up you were referring to notes you had in your pocket?

A No, I haven't any notes. I just merely read the case report on this here case.

Q You have the case report on this case?

A No, I haven't; I said I read the report.

Q Well, weren't you referring to some paper in your pocket while seated in the front row during the time the court was calling the names of each defendant and had each defendant arise as his name was called?

A I was just sitting down there as the names were called.

Q You heard them called and saw the defendants arise?

A I saw the last two men get up.

Q And didn't you refer to some paper in your pocket at that time?

A Yes

And what was that you referred to?

A I was referring to the bulletin here in my pocket. Do you wish to see it?

Q Does that bulletin refer to this case?

A No, it does not.

Q Have you any papers in your pockets that relate to this case?

A No, sir.

Q Did you have at that time?

A No, sir. Here they are (indicating pockets).

Q And you stated positively you were only present in the court room when the last two names were called?

A When the last two men stood up. I had just sat down as the last two men stood up. I heard the names called, but didn't hear the first two names called.

I have heard about Tony Panzich ever since I have been in Los Angeles, two years. On the night of May 13th I first learned that that man was Tony Panzich. I didn't know postively then it was him. I heard somebody say it was Tony Panzich. On the night of May 13th was the first time I had ever seen Tony Panzich. I first learned that one of the defendants was Tony Govarko the night of the arrest. I had first seen Tony Govarko on the night of May 4, 1931. I recall Tony Govarko as a waiter in that restaurant and first learned his name was Tony Govarko at the time of the arrest. I have never talked to him since the arrest. I first learned that one of the defendants was Nick Jurash on the night of the arrest. I first saw him on the night of May 13th working as a waiter in that restaurant. I first learned that one of the defendants was named John

Arko the night of the arrest. I first saw him on May 4th. To my knowledge, I haven't ever talked with any of these defendants since the time of the arrest. I don't recall it. The next time I saw them or any of them was at the preliminary hearing, the next morning after the arrest. I have seen Kelly, I don't recall the date, but approximately three months ago. I have never seen Nick Jurash or Tony Govarko between the time of the preliminary examination and this morning. When I refer to the preliminary examination I meant the arraignment before the United States Commissioner. It wasn't a preliminary hearing. I didn't testify there. I don't recall, but the defendants might have waived preliminary examination. That bin in which I found some empty bottles and a bottle partially filled with whiskey wasn't even in that building. It was up next to the back of the wall, but not in the building. This cafe didn't occupy that whole building. There were several other things in the building, including the Santa Monica Elks Club. I think there was a store or two in the building.

HARRY J. WAITE

a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. ROWELL:

I am a Federal Prohibition Officer and have been in the service a little over two years. I went to the premises in Santa Monica known as "Tony's Goodfellows Inn" on May 15, 1931, accompanied by Agent Casey. Agent Casey and myself and Mr. Casey's wife went in and met Mr. Panzich, and he escorted us to the booth, and we sat in there and a waiter came up, and we ordered three meals, and then as the waiter started

away, Agent Casey asked him if we could get a pint of whiskey, and he looked at me, and Agent Casey said, "Oh, he is a friend of mine." Then the waiter said, "All right" and went away. Pretty soon, another man came down and pushed the curtain over a little bit and handed Agent Casey a pint of whiskey and went away. Then the meal came, and we had that, and after we got through, the waiter came and handed Mr. Casey a check, and Mr. Casey said, "What about the whiskey?" and he said, "It is all on there" and we paid him with a $5.00 bill marked money. I had the serial numbers in my book, so as soon as he gave Mr. Casey the change, I told him he was under arrest, and I checked the numbers with the serial numbers in my book, and Mrs. Casey went outside and notified the other agents outside, and they came in and helped search the place. The bottle, which is Government's Exhibit No. 7 for Identification, was taken out of the safe by Agent Brooks during the search after the safe had been opened by Mr. Panzich. It was then brought to the office and put in the Evidence Room I believe. I didn't see it after that. After the arrest, the person who was waiting on our table said his name was Wilson. I had never seen him up to that time. I might recognize him if I saw him now. I am not sure. I have not seen him since then only here in Court. I think I see him here now. I didn't learn the name of the person who came to the booth with the pint bottle the night that Agent Casey and myself were there. I don't believe I would recognize him if I saw him again. I only saw his head and shoulders as he pushed the curtain aside.

CROSS-EXAMINATION

BY MR. GRAHAM:

I don't remember what I ate that night, maybe pot beef or something like that. I am just guessing about that, because I don't remember just what it was, because it was a regular dinner on the menu. I suppose it was a regular dinner. We ordered it off the menu. I am not so sure whether I ordered it a la carte or not. I think mine was a la carte, because I had eaten before I went there. I just tasted of the whiskey that night to be sure it was whiskey. Agent Casey asked the waiter about the price of the whiskey, and the waiter said something about two kinds, one for $2.00 and one for $5.00, and we said we would take the cheaper one. We were there just long enough to eat a meal before the arrest took place, maybe fifteen or twenty or twenty-five minutes, something like that. We went in at eight o'clock, and if I remember right the other boys came in about half past. When we entered, Panzich did not meet us at the door. He was at the desk inside, about the center of the place. He was standing there. We walked in, and he was standing at the desk. He showed us to the booth and seated us there at the table. It was only a few minutes before the waiter came over. The waiter presented the bill to Mr. Casey, and Mr. Casey gave him a $5.00 bill. The waiter didn't have much chance to do anything with it. I told him he was under arrest and recovered it. He had it in his hand. I suppose he was going to put it in his pocket or take it to the desk. I didn't give him a chance to do anything else with it. He had made change. Mr. Casey took the change, and I saw Mr. Casey give the waiter back his change. I don't know how much change he gave him.

I didn't count the change. The bottle that was found in the safe, was taken out of the safe, not from a shelf above the safe. I saw the gentleman when he took it out. I am positive as to that.

EXAMINATION BY THE COURT:

I think I identify the waiter. I think he is the second one over there in that row, from the left hand side (indicating the defendant Joe Wilson). He was the one that Mr. Casey gave the $5.00 to and the change to, and I recovered it. Mr. Panzich was there at the desk and showed us to the booth. We ordered the liquor from the waiter and this other man brought it to the booth and handed it inside. The waiter came to our booth, and we ordered the dinner from him. I identify the second person (Mr. Wilson) as the waiter; and then Mr. Casey had some talk with him about whiskey prices, about there being two kinds, $2.00 and $5.00, and then ordered from him the $2.00 kind, and then this third man—I don't remember who it was, as I only saw his head and shoulders,—came and handed the whiskey to Mr. Casey and left immediately. I don't know whether the third man, who actually delivered the whiskey, is present or not.

THOMAS ROBINSON

a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. ROWELL:

I am Secretary-Manager of the Elks in Santa Monica, and was acting in that capacity during the year 1930 and '31. During the course of that time I met Tony Panzich. I leased the cafe, which he was operating at 3003 Main Street, in the Elks' Building, at

Ocean Park, to him. Government's Exhibit No. 9 is a lease between Santa Monica Lodge No. 906, Benevolent and Protective Order of Elks and Tony Panzich. (By the terms of this lease, the Elks Lodge leased to Tony Panzich the premises upon which Tony's Goodfellows Inn was conducted, together with all furniture, furnishings, dishes, silverware, linens, and equipment enumerated in an inventory attached thereto; also storeroom No. 8, fronting on Pier Avenue, being No. 208 Pier Avenue. Said lease commenced on the 18th day of August, 1930, and ended on the 18th day of August, 1931, the aggregate rental being $2,820.00, payable $470.00 upon the acceptance and signing of the lease and $235.00 per month in advance for each of the succeeding ten months.) Mr. Panzich went into possession of those premises a few days before the date of the lease. He got ready a little bit ahead of time and took possession then. It was all right with us. He vacated the premises on the 15th of September, 1931. As far as I know, he was continuously in possession of those premises between those two dates. In my capacity as manager of the club, I received the rent for those premises from Mr. Panzich for every month.

EXCEPTION NO. III.

"Q After the time the lease was executed was any security given you for the faithful performance of the lease?

A Yes, some trust deeds, which I have here, trust deeds to property.

Q And by whom were those delivered to you?

A Mr. Panzich.

Q Was any other person present during the negotiations, that is, anyone other than on behalf of the

Elks Club and this lessee at the time these papers were delivered?

A I don't believe so; I don't recall that.

(Defendant's counsel inspects papers handed him by the witness.)

THE COURT: Do you deem those material, Mr. Rowell? The witness testified the lease was made with the defendant Panzich, and that he went into possession and that he paid the rent.

MR. ROWELL: Yes, your Honor, I think this is material in some other matters.

THE COURT: All right.

MR. ROWELL: I will offer them in evidence.

THE COURT: Any objection?

MR. GRAHAM: Just what deeds are you offering in evidence?

MR. ROWELL: The two corporation grant deeds which were delivered to Mr. Robinson by Mr. Panzich as security for the lease.

MR. GRAHAM: Well, I object to the introduction of those grant deeds, upon the ground they are entirely irrelevant and immaterial.

MR. ROWELL: If your Honor cares to see them—I think I can state the points they bring out other than the lease itself. The grant deeds vest title in John Arkovitch and Tony Panzich, and the lease was given by Tony Panzich, and John Arkovitch, I believe, is the same person as Arko, indicted here.

THE COURT: Well, that is a deed to the Elks organization?

MR. ROWELL: No, it's a deed from the Title Guarantee and Trust Company to John Arkovitch, John Panzich and Tony Panzich, which deeds were de-

livered to the Elks organization as security for the performance of the lease now in evidence.

THE COURT: Well, the mere delivery of the deeds would not make them security.

MR. ROWELL: I am not talking about the legal question. That's the purpose for which Mr. Robinson said they were delivered.

MR. GRAHAM: I fail to see how they could secure the Lodge.

THE COURT: Of course, in one way they would not be material.

MR. GRAHAM: Unless they had some intrinsic value of their own.

THE COURT: Well, of course, the deed has never been recorded?

MR. ROWELL: No, your Honor.

THE COURT: Well, your contention, of course, is that John Arkovitch and John Panzich—John Arkovitch, at least, is a defendant in this action?

MR. ROWELL: Yes, your Honor.

THE COURT: Well, let it be admitted in evidence.

MR. GRAHAM: Well, your Honor, there is no evidence of that fact.

THE COURT: Not so far, unless there is a presumption from the identity of names.

MR. GRAHAM: But there is no identity of names.

MR. ROWELL: I believe that Agent Casey testified while he was on the stand that he was known as Arko, Arkovitch and Kelly.

THE COURT: Yes, let them be admitted in evidence.

MR. GRAHAM: Exception.

THE CLERK: Government exhibit 10."

EARL G. BLEAK

a witness on behalf of plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. ROWELL:

My name is Earl G. Bleak. I am Pro-Manager Security First National Bank, Ocean Park. I have here under subpoena the records of the bank in regard to the account of one Tony Panzich. I have here the signature card executed upon the opening of the account. The account was carried under the name of Tony Panzich, although the checks were imprinted with the name "Goodfellows Inn by Tony Panzich." No one else was authorized to draw on that account. This bank is located on the Corner of Pier Avenue and Trolley Way, 168 Pier Avenue, Ocean Park. That is one block west of 3003 Main Street. (At this stage of the proceedings, it was stipulated by and between counsel that, if the custodian of the Government Warehouse were called, he would testify that he has had possession and custody of these various bottles which have been marked as Government's exhibits for identification, and that they are now in the same condition they were when he received them. It was further stipulated that if Mr. Stribling, the Government Chemist, were called to the witness stand, he would testify that the bottles which were marked Government's Exhibits 2, 3, 5, and 6 for Identification, contain alcohol in excess of one-half of one per cent by volume and are fit for beverage purposes. Whereupon Exhibits 2, 3, and 5 for Identification were offered and received in evidence as exhibits bearing those numbers. Government's Exhibit No. 6 for Identification was then offered in evidence, to which offer counsel for the defendants objected, and the ob-

jection was sustained. Whereupon the plaintiff announced that it rested, after which the jury retired while the following proceedings were had in the presence of the Court, but in the absence of the jury.)

EXCEPTION NO. IV.

MR. GRAHAM: If the Court please, on behalf of each defendant, I move the Court to instruct the jury to bring in a verdict of not guilty, on the ground that the evidence is insufficient to warrant a verdict of guilty. (The matter of the foregoing motion was discussed by the Court and by counsel for plaintiff and defendants.)

THE COURT: I think that there is plenty of evidence to sustain such a finding, and the motion is denied.

MR. GRAHAM: May the record show an exception to the denial of the motion.

THE COURT: Yes, sir.

TESTIMONY ON BEHALF OF THE DEFENDANTS

NICK JURASH

a witness on behalf of the defendants, testified as follows:

DIRECT EXAMINATION

BY MR. GRAHAM:

I am one of the defendants in this case and reside at 6935 Denver Avenue, Los Angeles. I have lived in Los Angeles about twenty-two years. I am acquainted with the defendant Tony Panzich; have known him since the 25th of May, 1931, the 15th of May, 1931, beg pardon. I first met him at Tony's Goodfellows Inn, Ocean

Park. That was the day I was arrested in this case. The circumstances under which I met him were these: I wasn't working then, and Mr. Restovich I went to his house to dinner that day on the 14th of May, and he says that he knew Mr. Panzich and if I wanted to take a ride with him to Santa Monica, he would see what he could do, if I could get a job, with the summer season coming on, that I had a chance. The last job I had up to that time as a waiter was in 1921. I had had some experience as a waiter. I then went with Mr. Restovich to this cafe. He took me in his car to the Goodfellows Inn in Ocean Park, on the 14th of May, about eight o'clock, eight-thirty in the evening, and he went in with me. My wife and two daughters were sitting in the car outside. They were parked outside the cafe. Mr. Restovich then introduced me to Mr. Panzich, and I discussed employment with Mr. Panzich. He told me to come back to work the next day, the 15th, at five P. M. I went back to work there at five P. M. on the 15th and was arrested the same evening. I never knew where that cafe was before that and had not been in it before that. I did not know Mr. Panzich at all before that. Before that I was painting two houses, my own; and when I got through with my own Mr. Muhn asked me, he said, "Now will you paint mine?" and he said, "Mine needs painting very bad", and I said, "Yes, I am not doing anything." He said, "Go ahead." I then painted Mr. Muhn's house. I finished painting it on the 13th of May, about two or two-thirty in the afternoon. I had been working painting his house six and a half or seven and a half days, I don't know which. It was raining then, and probably a couple of days in the rain I didn't paint then, but with the exception of the days it rained, I worked steadily painting his house

until I finished it, and it took six or seven days. I painted two coats on the outside and one coat on the inside, and the ceilings. I never saw any of those Prohibition Agents, that testified here, before the night I was arrested. I never sold any of them any whiskey. I never waited on any of them in that cafe.

Cross-Examination

BY MR. ROWELL:

On the 30th of April, 1931, I was painting my house. I had two houses, and I was painting them both outside, and I wouldn't recall whether it was raining on the 30th of April or not, but if it wasn't, then I was painting my house then. I worked until that time on the sewers, but on the 30th of April I was not doing anything besides painting my house. I was not in Ocean Park or Santa Monica on the 30th of April. I was at the Goodfellows Grill or Goodfellows Inn, at 3003 Main Street, Santa Monica, about eight o'clock, on the 14th of May, that evening. Before the 14th I was never there. I didn't know where that was. I went to work on the 15th of May, about five P. M. I had never worked at all in that cafe prior to five P. M. on the 15th of May. I was not there on the 4th of May nor the 13th of May. I am absolutely sure of that.

N. B. RESTOVICH

a witness on behalf of the defendants, testified as follows:

Direct Examination

BY MR. GRAHAM:

My name is N. B. Restovich. I reside at 4516 Queen Anne Court, Los Angeles. I have lived in Los Angeles twenty-five years. I have been a cafe owner. I am in the

insurance business the last seven years. I am acquainted with Nick Jurash, one of the defendants in this case. I knew him in April and May of 1931. In the latter part of April and up to the middle of May in 1931, he was painting some houses of his own and some of his neighbor's, I don't recall the name. I am acquainted with the defendant Tony Panzich. I have known him about fifteen years. I saw Mr. Panzich on the 14th of May, 1931, in his cafe, in Santa Monica. I went there about eight or eight-thirty in the evening with Nick Jurash and his wife and his daughter. Mr. Jurash entered the cafe with me and I introduced him to Mr. Panzich. At that time Mr. Jurash was not working in that cafe. He had not been working in that cafe a few weeks prior to that time. At that time I had a conversation with Mr. Panzich about Mr. Jurash working there. I have asking him if he could give Mr. Jurash a job, that he needed it because he had four or five youngsters, and that he used to work for me years ago and was a very good waiter, so he answered and said to come the next day and he will try him out to see what he could do for him. Mr. Jurash and I had a cup of coffee and a sandwich on the counter and then left about eight-thirty or nine o'clock. Mr. Jurash had never worked for Mr. Panzich in that cafe before that. That was the first time I had ever been to that cafe. We looked all around Santa Monica and went over to the old Elks' Club looking for it. I had heard of it, but didn't know the location of it.

CROSS-EXAMINATION

BY MR. ROWELL:

I am positive sure that Mr. Jurash had not been working there before. To my knowledge Mr. Jurash

wasn't doing anything after he got through painting the house in the afternoon. I do general insurance work of all kinds, fire, theft and burglary. I am connected with Molin Cressey's concern. I remember very well the day on which Mr. Jurash was arrested. He called me on that day—well somebody called after he was arrested. We found the call when we came in. It was late in the morning, Saturday morning the call came in, the 16th of May, the day after his arrest, which was late in the evening or after midnight.

REDIRECT EXAMINATION

BY MR. GRAHAM:

I know positive it was the 14th of May when I took him down and introduced him to Mr. Panzich and on the 15th, the same day, when he went to work, he got arrested.

MRS. KATY JURASH

a witness on behalf of the defendants, testified as follows:

DIRECT EXAMINATION

BY MR. GRAHAM:

I am the wife of Mr. Jurash, one of the defendants in this case. I have been married to him about twenty-three years. I reside at 5635 Denver Avenue and have lived in Los Angeles twenty years, and at that address about eighteen years. I lived at that same place on the 4th of May, 1931. During the later part of April, 1931, my husband was painting houses. We had two houses, both in the same neighborhood on the same lot. My husband had been painting those two houses. I couldn't tell you when he started painting them, but it took him three or four weeks. He worked for several weeks at it.

After he finished painting those two houses of his, he painted the house next door for Mr. Muhn. I think he worked at that about a week. I don't know how many days; because of the rain, he stopped sometimes and came back again. I remember when he went to work as a waiter in the restaurant at Santa Monica on the 15th of May. I remember the time he was arrested in this case, the same night he went to work. That was the first time he went to work in that restaurant. He had never worked there before. He finished painting Mr. Muhn's house the day before, on the 13th. I went with Mr. Jurash and Mr. Restovich and my daughters down to Santa Monica on the 14th. I don't know what time of day that was. We left the house about five o'clock and got down after six. I don't know—early in the evening. That was the time he went down there to see if he could get a job. It was the next day he went to work. They told him to come and try it to see if he could do a good job. I am positive that he had never worked in that cafe before the day he was arrested, and he never knew the people either.

LENA JURASH

a witness on behalf of the defendants, testified as follows:

DIRECT EXAMINATION

BY MR. GRAHAM:

I am the daughter of Nick Jurash, one of the defendants. I go to Fremont High School in Los Angeles. I remember the time in May, 1931, when my father was arrested in this case. He went to work at the cafe in Santa Monica about five o'clock of the same day, the 15th of May, 1931. That was the same day he was arrested. My father had never worked in that cafe before

that day. Before that, he was painting our own houses and Mr. Muhn's. He painted our own first, and then painted Mr. Muhn's house. He finished his work painting Mr. Muhn's house on the 13th. On the evening of the 13th day of May, when he finished painting that house, Mr. Muhn came to our house and paid my dad for painting the house. I don't recall how long Mr. Muhn was there that evening. I wasn't there all the time. The next day, I went down to Santa Monica with my father and Mr. Restovich. We went to Ocean Park to the Goodfellows Cafe. That is where my father went to work the next day.

JOHN MUHN

a witness on behalf of the defendants, testified as follows:

DIRECT EXAMINATION

BY MR. GRAHAM:

My name is John Muhn. I reside at 6929 South Denver, in Los Angeles. I have lived in Los Angeles about five years. I am retired. Before I retired, I had a ranch in Pennsylvania. I am acquainted with the defendant, Nick Jurash, and live right beside him. I have lived beside him for five years, all the time I have been living here. In May, 1931, he painted my house inside and outside. He did that in May, about the first part of May. It took him seven days. He finished on the 13th of May in the afternoon, between two and three o'clock. On these days when he was painting the house, he worked all day at it painting it. I paid him for that work around supper time, around six o'clock. I paid him $5.00 a day, and he worked seven days. I paid him $35.00 right in his kitchen. His wife was there. He was at home that evening. I paid him. I stayed there about

half an hour. It got dark, and I couldn't see him around there any other time that evening. During the time he was working there painting my house, I don't think he was working at any other place during that time. He worked eight or nine hours a day painting. I have always seen him around there occasionally in the evenings. He was tired out and couldn't go any place. I have seen him around home in the evenings during the time he was working painting my house. Before he painted my house, he painted his. I saw him working on his house every day.

JOSEPH N. WILSON

a witness on behalf of the defendants, testified as follows:

DIRECT EXAMINATION

BY MR. GRAHAM:

I reside at 833 South Grand, Los Angeles. I am a married man, but I am not living with my wife. I am one of the defendants in this case. I was employed at Tony's Goodfellows Inn in the month of May, 1931, and on the 15th of May, 1931, that's the date on which I was arrested in this case, I went to work that day at eleven o'clock in the morning. I saw Mr. Casey, one of the Prohibition Agents who testified in this case, but I wouldn't recognize Mr. Brooks. I first saw Mr. Casey on May 15th at eight-thirty in the evening at the Goodfellows Inn in Santa Monica. When I first saw him, he was sitting in the booth at my station. I was working there as a waiter. That was the booth I was working on. There was one other gentleman and a lady with him. Mr. Brooks, who was on the stand this morning, was not the man who was with him. I think the heavy-set gentleman, Mr. Waite, was with him. I recognize Mr.

Waite as the other man that was with him. I was not acquainted with the lady and had never seen her before to my recollection. I do not remember ever having seen Mr. Waite or Mr. Casey before that evening. I served them with water and took their order and served them. I do not recall what their order was. I was waiting on several other tables that evening, and all these other tables were occupied. I was very busy taking care of seven tables. I don't recall what they ordered, but they ordered a dinner, and I served it to them. None of them said anything to me about whiskey or intoxicating liquor, and I said nothing about intoxicating liquors to them. It was not mentioned at all between us. No one else in the cafe approached the table while I was there, not in my presence or to my knowledge. After I served them, I presented them with a bill. They gave me three $1.00 bills, and Mr. Casey gave me the money, and I went to pick it up, and he showed me his star, and he said I was under arrest. I said, "For what?" and he said, "For the sale of a pint of whiskey." I said, "I didn't sell it and don't know anything about it"; and he said, "You are under arrest;" and he told Mr. Waite to place me under arrest and turn me over to the marshal. The money was laying on the table, and Mr. Waite picked it up. When I didn't take the money, he seized me and took it and said: "You are kind of tough;" and I said, "No, I am not, but I don't want to get framed." I had started to give him the change when he placed me under arrest. The money was never in my possession. There was a bottle part full laying on the bench. In these booths there was a bench on each side of the table, instead of chairs, and this bottle partly filled was laying on the bench beside Mr. Casey. That was the first time I had seen it. I did not bring it there

and do not know who did bring it there. After I was arrested, some other officers came in. They were already in when they took me out of the booth. They placed Mr. Panzich and Mr. Arko and the other two gentlemen under arrest. I am acquainted with the defendant Nick Jurash. That day was the first time I ever met him. He was employed there. He started to work at five o'clock on the day of the arrest. He had never worked in that cafe before to my knowledge. I had been working there since January 1st. During the interval from January 1st to May 15th I worked there continuously, and Mr. Jurash did not work there during any of that time. I never saw him in the cafe before the 15th of May. I am acquainted with the defendant Tony Govarko. I served him this night. He was never employed in that cafe while I was there. During the time I worked there from January 1st to May 15th, 1931, Tony Govarko was never employed in that cafe. He was in the cafe as a customer. I saw him in there two or three times. On the evening of the 15th of May I served Govarko at the counter. I don't recall what I served him. His check was 65c I think. It was for food. He had a steak and cup of coffee. He was arrested that night along with the rest of them. I was not personally acquainted with him; just served him as a customer.

CROSS EXAMINATION

BY MR. ROWELL:

I waited on Govarko that night, May 15, 1931. I do not know whether that is the check that I gave to Mr. Casey or not. We had several checks and they disappeared, and several checks were taken from the file and cash register. That might have been a check that is one of the kind which we gave to our customers there. I

think that is my hand writing on that check. The initials "B. R. K." mean one roast Kosher chicken. We featured the roast kosher chicken to take out. The initials "B. R. K." that means roast kosher chicken and that ticket is to take out for $2.00. I don't know whether that other ticket indicates one roast Kosher chicken for $5.00, one "B. R. K.". I don't think that is my ticket. Whether I served many people with the same ticket or one ticket for a customer is entirely up to the party. There is one ticket for a party unless they ask for them separately. This other ticket which is Government's Exhibit 4 is not my check so I don't know how many roast kosher chickens are shown. I don't know as those initials stand for the same thing on that ticket as they do on mine. This is not my check. Everybody made a different way of abbreviating. I wouldn't say what those four items for "R. K." each mean on this ticket. I worked there from the 1st of January to the 15th of May. During that time I did not serve anyone with intoxicating liquor. I never saw anyone use intoxicating liquor on the premises. I did not ever serve ginger ale to people there. I never saw anyone drink while they were in that Inn.

REDIRECT EXAMINATION

BY MR. GRAHAM:

Most of the business we did in the evening. We served lunches at noon. We opened at six in the morning but not enough there for breakfast. It was in the same building as the Elks Club. We did quite a business at noon time for lunches. That first item "R. P." means roast pork. The next one that looks like banana or pineapple is baracuda. In the cafe we featured those roast Kosher chickens. They were served all alone. We

did quite a business in selling them to people to take out, and frog's legs and those things all alone. These

EXAMINATION BY THE COURT

initials "B. R. K." I generally put the "B" on when it was to go out of the building. We put the "R" for roast and the "K" for Kosher. They didn't eat it there. It was to go out. I think it was left right there. I didn't serve it. They asked for the check before I delivered it, and put me under arrest before I delivered it. I hadn't really delivered them the roast chicken then. They paid me before I delivered that. Yes. They had finished eating their dinner. Part of the dinner was not roast Kosher chicken. They had roast pork and baracuda and then in addition to that they had roast Kosher chicken but I had not served them with the roast Kosher chicken and yet they paid me. That is not necessarily an unusual procedure. We always serve it last to keep it hot and brought it in when they were ready to go. They didn't give me any three or four one dollar bills. They gave me four $1.00 bills and I gave them change so I had not gotten any $5.00 bill at all and they didn't take a $5.00 bill away from me. They were minus their roast Kosher chicken when the bill was paid and yet

FURTHER REDIRECT EXAMINATION

BY MR. GRAHAM:

they paid for it. And immediately took the money away from me. They laid it on the table, they said I was under arrest and I said, "Why am I arrested?" and they said "For selling whiskey. When they ordered this chicken they ordered it to take home and I was going to bring it to them to keep it hot and they asked for the bill. That chicken was in the process of prep-

aration in the kitchen and that is why they asked for the bill. I put it on the bill.

TONY GOVARKO

a witness on behalf of the defendants testified as follows: through an interpreter, Martin Miklauschutz, said interpreter, being first duly sworn.

DIRECT EXAMINATION

BY MR. GRAHAM:

I am one of the defendant in this case. I am thirty-three years of age and live at 323 South Grand Avenue, Los Angeles. I have lived in Los Angeles three years and in the United States that long. I was born in Austria. I am a laborer. In the month of May, 1931, I was working for Bill Austin, a contractor. He is building houses under different contracts. I was working at 1971 87th Street. That is where I started, on April 15. I was cleaning around the house, digging and cleaning up the grass around there. I worked there for two weeks and then after that he sent me to Montebello. I was doing the same kind of work. He was building a house there as a contractor. I worked there three months. I have never been employed as a waiter. I have never been employed at Tony's Goodfellows Inn at Santa Monica. I was there the day of the arrest. I went there at 10 o'clock in the morning and saw two of my friends that were there. One of them is a waiter there and the other one is a cook. They are Pete Karovich and Nick Bakulich. The 15th of May was the night I was there. I just got through eating and was about to pay for my supper when the officer grabbed me by the hand and placed me under arrest. I was not there on April 30, 1931. I was not there on the evening

of May 4, 1931. I was not there on the evening of May 13, 1931. I saw these prohibition agents who testified here yesterday. I never sold any of those prohibition agents any whiskey in that cafe at Santa Monica. I never saw them before the time they placed me under arrest. I worked for Mr. Austin two weeks at the beginning when I started to work for him, and then I worked three months and a half later and that was all. I speak very little English and understand a little English.

CROSS EXAMINATION

BY MR. ROWELL:

On the night I was arrested the only thing they asked me was how old I was and how long have I been in this country and I didn't understand them about that very well but I answered that way when he was asking me, because they asked the same question of the others. I didn't understand it when he asked it of the others but they told me in the Slavonian language what they asked them. I was thirty-two at that time and that I was not married. I told them I was born in Austria and after the war became Jugo-Slavia. When they asked me how much I weighed and how tall I was and I answered them they were asking me by motions. I didn't see Agent Brooks on the 30th of April down at Tony's Inn in Santa Monica. I am absolutely sure of that. I didn't talk to him and I didn't wait on his table on the 30th of April, 1931, at Tony's Goodfellows Inn at Santa Monica. I learned the name of Casey yesterday and I saw the man—I never saw him before the time he arrested me, and yesterday I learned his name. I was not at Tony's Goodfellows Inn at 3003 Main Street, Santa Monica, on the 4th of May, 1931. I didn't have a

conversation with Agent Casey at that time and place and I didn't see him and I wasn't there and I didn't serve whiskey to him. I was not at Tony's Goodfellows Inn at Santa Monica at 3003 Main Street on the 13th of May, 1931 and at that time and place I didn't have any conversation with Agent Casey, the man who testified here yesterday and I didn't serve him. I wasn't there at all. I was at Montebello that day, all day on the 13th. I was not in Santa Monica during the day of the 13th of May. I was not in Santa Monica at any time during the day of the 4th of May, 1931. That was the first day I started working in Montebello. On the 30th of April, 1931, I was in Los Angeles. That was the day, the 30th, that I was through working for Bill Austin on 87th Street, and then on the 4th I started to work at Montebello. I remember the days because I know it, that's all. I couldn't tell you exactly what day of the week was the 30th of April, it was either Wednesday or Thursday, its so long ago. I don't remember what day of the week was the 4th day of May.

REDIRECT EXAMINATION

BY MR. GRAHAM:

Besides the Slavonian language I speak Spanish. (Whereupon under direction from Mr. Graham the witness exposed the palms of his hands to the jury).

WILLIAM AUSTIN

a witness on behalf of the defendants testified as follows:

My name is William Austin. I reside at 1971 East 87th Street, Los Angeles. It is classed as Los Angeles but it is in the County, not in the City limits. I have lived in Los Angeles since June 24, 1919. I am a gen-

eral construction contractor and have been in that business since 1917. I am acquainted with the defendant, Tony Govarko. He worked for me off and on several times. I have known him over eighteen months or two years. He was employed with me during April and until July or August and also during May, 1931. During the latter part of April he worked on 87th Street. He was fixing the lawn and I had to put in a new cesspool and cleaning the yard. As I recall, he worked there about two or three weeks. He next worked at Montebello. I had to remodel a house and put in an irrigation system and put in 5 cross-sections of floors and leveled the ground. He worked there as a common laborer. We started in at Montebello the first part of May, I can't remember the exact date but it was early in May. It was before the 5th of May. He worked there continuously except some days I wouldn't have any work, common labor, and he would lay off two days a week. He didn't show up to work for two or three days and came back and told me he had been arrested but I didn't go into details. I wanted to know if he would go back to work; that is as far as I know. That was about two weeks after we started. Altogether I had quite a different number of men, 5 or 6. I had plasterers, electricians, plumbers, and two or three other laborers besides him.

CROSS EXAMINATION

BY MR. ROWELL:

One of the other laborers I had was Winfield Husted and the other, if I recall, is Frank Moran. I do not recall all of the other men working on that job. I recall they worked on other jobs before that. The painter, I recall his name. As near as I can recall, Govarko

should have been working for me on the 30th of April, 1931. I couldn't say whether he finished the 30th or the 29th, but it was the last part of the month. The last day of the month or the next day, I couldn't say for sure. It was either the 3rd or 4th of May, Govarko was out there on the job. I have never talked to anyone about what I was going to testify to on the witness stand here today. I didn't talk to Mr. Panzich. Govarko asked me if I would come and testify he worked for me. I did not talk to Mr. Graham, the attorney. I think I have some time books. I have a good many records at home. I might have time books. I keep records of all my jobs.

JOSEPH PAVOLOVICH

a witness on behalf of the defendants, testified as follows:

DIRECT EXAMINATION

BY MR. GRAHAM:

My full name is Joseph Pavolovich. I live at 614 East 4th Street, Los Angeles. I have lived in Los Angeles the last 20 years. I am a painter and decorator and show-case and fixture finisher. I have been employed by William N. Austin, the last witness. I was employed by him in May, 1931, at 87th Street. I was employed on the job at Montebello in May, 1931. I am acquainted with the defendant Tony Govarko. Govarko was employed on this job on 87th Street the latter part of April, 1931. He was employed by Mr. Austin on the job in Montebello in May, 1931. He worked there with me. I did painting. He was doing labor work. Sometimes they didn't have anything for him to do. He didn't work steady every day, but about five days a week average. That was between the 1st and 5th that he was so employed. I never talked to Govarko in

American. I talked to him in Austrian. I never heard him talk in English with anyone. He tried to talk American and likes to learn, but he can't talk very good.

WINFIELD HUSTED

a witness on behalf of the defendants, testified as follows:

DIRECT EXAMINATION

BY MR. GRAHAM:

My full name is Winfield Husted. I reside at 631 East 23rd Street, Los Angeles. I have lived in Los Angeles ever since 1919. My trade is mechanic, but I work on the building with the laborers, because I can't find a job at my trade. When I can't get a job at my trade, I work as a laborer. I was working for Mr. Austin in the early part of May, 1931. I have worked for him for three years. In the early part of May, 1931, I was working in Montebello building a house. I know the defendant Tony Govarko. I know his name. We called him Tony there. I worked for Bill Austin at that time and on the 87th Street job and I also worked on that job at 87th Street. Govarko was a laborer and worked as a handy man. Same kind of work as I was because when Mr. Austin has some other job I take charge of the job, but when he is there I work as a laborer too, because we cleaned that big 5 acre tract, and we cleaned the whole tract before we built the house. He did that work. He worked the early part of May, four or five days a week, and sometimes got laid off one day. It depends upon how much work there is to do. I remember when Tony got arrested in this case. He told me when he came back to work. He was off three or four days. Before that time he had been working fairly steady, four or five days a week. He talked in Spanish

to me. I speak Spanish. I was born in Mexico. I tried to talk English to him but I could hardly understand what he said but he talked good Spanish.

JOHN ARKOVICH

a witness on behalf of the defendants, testified as follows:

Direct Examination

BY MR. GRAHAM:

My name is John Arkovich. Some people call me Kelly for nickname. My nickname is Kelly. People call me Arkovich most of the times, but some people call me Kelly. I never told anyone my name was Kelly. My business is waiter. In April and May, 1931, I was employed in Ocean Park at Tony's Goodfellows Inn. I was employed in Ocean Park at Tony's Goodfellows Inn. I was head waiter. I started work there at the time the place was opened. I don't exactly remember the date. It was about the 17th or 18th of August, 1930. Tony Panzich hired me to work. He was the proprietor of the cafe. My duties as head waiter was to seat the people as they came in the place.

Examination by the Court

My duties were to seat them. That is all I did. I didn't wait on them. I was just the head waiter, to seat people at the tables. I was not a steward. I was head waiter. Just seated the people, that is all I did there. When the customers came in looking for a table I seated them. That is all I did. Just showed people that came in to eat to the place where they could sit down. That is all I did.

FURTHER DIRECT EXAMINATION

BY MR. GRAHAM:

I didn't wait on any of the tables at all. I am acquainted with the defendant Nick Jurash. I first met him on the night of the 14th. I first met him at Santa Monica in the cafe. His cousin came down there with him and went over to Mr. Panzich and asked him if he could give him a job and he went to work on May 15th, the day of the arrest. He had never worked in that cafe before that. I am acquainted with Tony Govarko. He never worked in that cafe. I saw him there one time May 15th, the day of the arrest. I saw these prohibition agents who testified here yesterday, Mr. Brooks and Mr. Casey. I never sold any of those men any whiskey and I never served them with any whiskey. I don't remember seeing them in the cafe, maybe I did, I don't remember. To my knowledge the only time I seen them was when I was placed under arrest. I don't remember that they were in the cafe before that. When people came into the cafe it was part of my duty to seat them. I seated a great many people while I was in the cafe. Sometimes four or five hundred. Every day it wasn't the same thing. These people might have been in the cafe but I don't remember them.

CROSS EXAMINATION

BY MR. ROWELL:

I did not have more of a responsible position there than head waiter. I wasn't Mr. Panzich's partner. I did not put up part of the security for the lease. My name is John Arkovich. I am the same John Arkovich whose name is mentioned in the grant deed given to the Elks Club as security for the lease. Tony Panzich put up his own security for the lease. I am the same John

Arkovich mentioned in that deed. This is a deed to me and Tony Panzich and John Panzich from the Title Guarantee and Trust Company to certain property in the County of Los Angeles, land. Two different pieces of land, the Easterly 25 feet of Lot 1 and the other is the Easterly 25 feet of Lot 2, 50 feet altogether. Tony Panzich, John Panzich and I bought this land together six years ago. (In response to the question "You and Tony Panzich were working together in another restaurant at that time, weren't you, or operating another restaurant" the witness replied: "I was never in partnership with Tony"). I was working for him, but not as a partner. When he came to make the lease to the Elks Club building at Santa Monica, I didn't know he was going to move down there before he made that lease. He didn't talk to me about moving to Santa Monica until he moved down there. Before he went down to Santa Monica his restaurant was on First Street.

EXCEPTION NO. V.

Q Where was his restaurant before he went down to Santa Monica?

A On 1st Street.

Q Well, that place was closed before you moved to Santa Monica?

A I don't remember if it was or not.

Q Well, you remember when it was padlocked?

MR GRAHAM: Now, just a minute. I object to that, and assign the question as misconduct and error.

THE COURT: You can object all you want—

MR. GRAHAM: I will.

THE COURT: Now, Mr. Graham, don't go very much further.

MR. GRAHAM: I beg your pardon.

THE COURT: This is a legitimate inquiry made at the request of the Court, as you well know, and under circumstances justifying a thorough ventilation of the actions of this witness with a scheme which are, to say the least, a little bit suspicious at the present time, and it will go to the utmost.

MR. GRAHAM: I have no objection to the inquiry being pursued, but I made my assignment.

THE COURT: You have made your objection to it?

MR. GRAHAM: Yes.

THE COURT: The Court is ready to rule.

MR. GRAHAM: I also wish to ask the Court to instruct the jury to disregard the question.

THE COURT: Well, your request is denied. Overruled. Go on.

MR GRAHAM: Exception.

THE COURT: Go on.

MR. ROWELL: Q Do you remember when the padlock was placed on that place on 1st Street?

A I don't remember the date.

Q You remember that it happened, however?

A I don't remember to my knowledge.

Q You were working for Tony Panzich at the time it was padlocked, weren't you?

A I was working for him. I don't know, when was it padlocked?

THE COURT: Do you say you don't know whether——

THE WITNESS: When was it padlocked?

THE COURT: Q You say you don't know whether it was padlocked or not. Is that correct?

A I don't remember when.

Q You don't remember when what?

A I don't remember when he was out of the place on 1st Street.

Q Do you remember or don't you remember whether the place ran by Tony Panzich was padlocked?

A The place it was closed. I don't remember if it was padlocked or not.

Q Well, it was closed by the Government officers, wasn't it?

A I don't remember.

Q You don't know if it was closed by the Government officers or not?

A No

MR. ROWELL: Q You were working there at the time it was done?

A I was working before.

Q And you knew that they had started proceedings to try and close it up?

A I knew the place was closed, but I didn't know who closed it.

Q Don't you remember testifying here in the proceedings to try and close it up?

A No.

Q Weren't you here with Tony Panzich on that day?

A No, sir, I was not.

Q How long have you been with Mr. Panzich?

A Oh, I have been with him more than 10 years.

Q Where did he have a restaurant when you first went to work for him?

A On 1st Street.

Q Were you ever in the Summit Avenue Place?

A Yes, I was down there to his house once in a while.

Q Well, he had a restaurant there on Summit Avenue didn't he?

A No, he didn't.

EXCEPTION NO. VI.

Q Did you move from the 1st Street place directly to Santa Monica?

A Tony moved down there and opened the place and gave me a job.

Q Well, you remember when they quit business on 1st Street, don't you?

A Yes.

Q And you remember when you opened the place in Santa Monica? I don't mean the exact date. I mean about the time you opened the place down there?

A I didn't open it myself.

Q You know when the place was opened at Santa Monica, don't you?

A Yes

Q All right, and you remember when the place was closed on 1st Street, when you quit work on 1st Street?

A I don't remember the date.

Q You don't remember the date, but you remember you did quit work there?

MR GRAHAM: I object on the ground it is not proper cross examination.

THE COURT: Overruled.

MR. GRAHAM: Exception.

THE COURT: Mr. Reporter, read that question.

(Question read)

A I don't remember when that place was closed.

Q BY MR. ROWELL: You know that it was closed, don't you?

A Yes

Q And you quit work down there?

A Yes.

I also went to work down at Santa Monica. I imagine it was about three months between the time I quit work on 1st Street and the time I started working at Santa Monica. I am not positively sure. During that three months I was not working for Tony. I did not see him very many times during that time. I was not with him when he wrote this lease up with the Elks Lodge on this place at Santa Monica. He said "I am going to assign my share of the lease" for the place down at Santa Monica. Panzich told me, "I am figuring to open a restaurant" and asked me if I wanted to work for him.

EXCEPTION NO. VII.

Q When he asked you if you wanted to work for him down there didn't he tell you he was going to put up this land you had a third interest in for security?

A Yes, to assign his share of the lease.

Q Did you not assign your share?

A I did not.

Q Have you any interest in this land now?

A Yes

Q And have you any papers to show your interest was not included in this paper or deed that was given to them?

MR. GRAHAM: Objected to, not proper cross examination.

THE COURT: Overruled.

MR. GRAHAM: Exception, and objected to on the further ground it assumes facts not in evidence; no evidence of the interest of anyone in that property.

THE COURT: Overruled.

MR. GRAHAM: Exception.

EXCEPTION NO. VIII.

MR. ROWELL: Q Did you ever get a statement from the Elks Club that they weren't holding your portion of this property as security for the lease?

A No, sir.

MR. GRAHAM: Same objection.

THE COURT: Overruled.

MR. GRAHAM: Exception.

Tony Govarko was not in that restaurant on the 30th of April, 1931, employed as a waiter. He was not there on April 30th. I know that. He was not there on May 4th. I know that. I am sure he was not there on the 13th of May, 1931. I am sure of that. I don't remember those dates but I never seen him there but one time and that was on May 15th. He was there about 4:30 or 5:00 o'clock when I first seen him. I went to work at two o'clock in the afternoon. He wasn't there until 4:30 or 5:00 o'clock. He came in about 4:30 or 5:00 o'clock. I saw him come in but he didn't come in with anybody. Nick Jurash was not there on the 30th of April, 1931. I am sure of that. I am sure he was not there on May 4th. He was not there on May 13th, 1931. The first time Nick Jurash was ever there was on the 14th of May. The only conversation I ever had with Mr. Brooks was when he placed me under arrest. He asked me what my name was. I didn't see him there on the 30th of April, on the 4th of May or the 13th of May. I am sure of that. It is not a fact that on the 30th of April, 1931, in the evening that I delivered to Mr. Brooks one pint of whiskey (Government's Exhibit I in this case). It is not a fact that I delivered to Agent Brooks and Agent Casey a pint of whiskey on the 4th of May, 1931. It is not a fact that I served to Agent Brooks and Agent

Casey while they were eating their dinner on the night of May 13, 1931, a bottle of wine. It is not a fact that I delivered to them another pint of whiskey on that same day.

REDIRECT EXAMINATION

BY MR. GRAHAM:

I did not sign any documents relating to the lease that Mr. Panzich had on that cafe.

EXCEPTION NO. IX.

Whereupon, the following proceedings were had:

MR. GRAHAM: If the court please, the defendants rest, and at this time I renew the motion made at the conclusion of the testimony and evidence of the prosecution and am willing to submit it without argument.

THE COURT: Denied.

MR. GRAHAM: Exception.

REBUTTAL TESTIMONY

on behalf of the plaintiff

HARRY J. WAITE,

called in rebuttal on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. ROWELL:

I don't remember that on May 15, 1931, at Tony's Goodfellows Inn at Santa Monica, California, if Agent Casey, Mrs. Casey or myself, or either of us, placed on order for Kosher chicken to be taken out of the restaurant by us or either of us. I did not. No chicken was delivered to me there to be taken out of the restaurant.

EXAMINATION BY THE COURT

I did not, nor did anyone in my presence. I was with those parties just mentioned and I never heard anything about a Kosher chicken. I didn't hear it. If it was ordered I didn't hear it.

CROSS EXAMINATION

BY MR. GRAHAM:

I know what they call Kosher meat. It is Jewish meat, I believe. It's fowl or meat prepared in some way according to the ritual of the Jewish faith. That is what I understand it to be. I stated yesterday that I didn't recall what I or any of the others did order on that evening. It was a lunch of meat and vegetables, but I don't recall what I ordered or any of the others ordered. I know I had fish. The others ordered meat.

S. W. BROOKS

called in rebuttal as a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. ROWELL:

I paid the bill for the food and other matters ordered at Tony's Goodfellows Inn at Santa Monica on April 30, 1931. I looked at the statement. It had an item on it listed as "B. K. R." or "B. R. K." I believe it was "B. R. K." At that time I did not order any roast Kosher chicken nor did any one of my party in my presence. I did not take any packages with me from the restaurant other than Government's Exhibit I, nor did anyone else take anything from the restaurant that they didn't take into the restaurant. On the 4th of May, 1931, I saw the statement that was presented for pay-

ment. It contained an item listed as "B. K. R." or "B. R. K.". They may be transposed, those letters. I did not nor did anyone else in my presence at that time and place order any Kosher chicken. Government's Exhibit 2, containing some fluid, whiskey, was all that was taken away. I saw the statement that was presented for payment on May 13th. It contained such an item as I have described, initials "B. R. K." or "B. K. R.". I did not nor did anyone else in my presence order that day any Kosher chicken. I did not nor did anyone else in my party take with them from the restaurant any packages or anything that they didn't have on entering the restaurant other than Government's Exhibit 3, the pint bottle of whiskey. That is all that was taken away. I know the defendant, Govarko in this case. I spoke to him in English on three different dates, one on April 30th when I was in the booth and Mr. Arko had served me with the liquor, and we were seated in there a few minutes and Mr. Govarko came into the booth with the pint bottle of whiskey in his hand, sat glasses down before us and began to pour out the whiskey and I said, "What are you doing" and he said "I am in the wrong booth". He said "You might as well sample this anyway. This is bonded stuff". I told him we had whiskey already and he went away and took it. I am sure that is the defendant Govarko in this case. I saw him on two occasions and know him well. That was on April 30th. He came in by mistake to the booth that night. I spoke to him in English on May 13th. He came into the booth, he and Arko were in there at the same time and Mr. Govarko was pouring the drinks of liquor out when the defendant Arko pulled the cork out of the wine and they were both in the booth at the same time. I talked to him at that time in English and on

both occasions he spoke what I would say was very good English, but not fluently, but he understood me all right, and I understood him. I saw him on the 15th of May when I placed him under arrest and right away he told me he couldn't speak English. I didn't have any conversation with him before I arrested him on the 15th.

CROSS EXAMINATION

BY MR. GRAHAM:

The first time I saw Mr. Govarko was on April 30th. He was dressed just about the way he is now. He was not waiting on our table. We had a waiter serve us the food and Arko served us the liquor, and that was the time I saw Govarko come in and start serving drinks. I didn't give that testimony yesterday. It didn't occur to me yesterday. It occurred to me today when he testified that he couldn't speak English. I didn't testify that on one or two occasions Govarko did wait on our table and serve us food. He never served me food any time. I don't think I ever testified that I saw Jurash there on the 30th. The first time I saw Jurash there was I believe the 4th of May; I had no contact with Govarko on the 4th. My contacts with Govarko was the 13th and 15th. I wouldn't testify that I saw him there on the 4th. I saw Jurash there on the 4th and 13th of May. I am not as positive that I saw Jurash there on the 4th and 13th as I am that I saw Govarko there on the 30th of April, because I didn't have any conversation with Jurash such as those I did with Govarko. On the 30th of April, I recall that we ordered some sandwiches, all four of us had sandwiches to best of my knowledge. There might have been one exception but I am sure we all ate them, but I don't recall. Casey paid that bill. I

recall that the members of the party ordered some kind of meat, not regular meat, but some funny part of the beef they call meat. On April 13th, I don't recall what I had, nor what the rest of the party had. (Whereupon, upon application of the United States Attorney, the Court permitted the plaintiff to reopen its case in chief).

LAWRENCE H. MacDONALD

a witness on behalf of the plaintiff, as part of plaintiff's case in chief testified as follows:

DIRECT EXAMINATION

BY MR. ROWELL:

I was present at Tony's Goodfellows Inn on the 15th of May, 1931. I assisted in making a search of the premises at that time. Just on the outside of the back door, as you go out the back door there is a number of bins there, I should say four or five. They are back right against the building. I would say you have to travel four or five feet before you come to one of those bins. I made a search of those bins and Agent Casey assisted me. I recall one of the bins had—one had coal in it, and the bin next to the door had several empty bottles and empty cardboard cartons in it, and either the first or the second bin from the door, Agent Casey found a pint of whiskey in it. I was with him at the time it was found. Government's Exhibit 6 is the bottle that was found by Agent Casey. I have my initials and handwriting there as identification marks. Off the back of the kitchen there is a hallway that runs through to some store rooms in the back of the building, and then off of this hallway there is another hallway that runs to the back door that opens into the auto park next door to the building.

EXCEPTION NO. X

MR. ROWELL: I offer Government's exhibit 6 for identification in evidence.

MR. GRAHAM: Objected to on the ground that there is no connection shown between it and any of the defendants. The last answer of the witness shows that this bin, while it was against this building, was in a space which was an auto park.

THE COURT: A what?

MR. ROWELL: I don't believe that was the testimony. It was near an auto park.

MR. GRAHAM: Let me ask the witness another question. I think I can clear that up.

Cross Examination

Q You say the back door of the kitchen opens into a hall?

A There is a hallway opens off the kitchen and goes to the store rooms in the back of the building.

Q And then there is another hall back of that?

A No, there is a hall that turns off at right angles to that. To the best of my memory its about 8 or 10 feet from the kitchen, turns at right angles and goes to the back door.

Q And these bins were near that back door?

A Yes, sir.

Q And also near that back door was the auto park?

A Yes, it stood around there.

Q Well, at least, back of the back door was an open space?

A Yes

Q And there was an auto park there?

A Yes

Q There were other stores in the building also, weren't there?

A I don't recall that.

MR. GRAHAM: I think, your Honor, that shows the *binds* were even more accessible to the auto park than to this cafe. They were closer to it and were in what was a part of it. They were in a different space, and in a different space was the auto park. There is not enough testimony there to warrant the introduction of this against the defendants.

THE COURT: Well, there is not necessarily an inference that the liquor had any connection with the kitchen. At the same time there is neither any necessary inference that it didn't. Its a matter of the weight of the evidence, I believe.

MR. GRAHAM: I would like to call the Court's attention also to the fact that this bottle appears to be a different kind of a bottle from the other bottles introduced in evidence.

THE COURT: Well, of course, that is a circumstance that will be taken into consideration, whether or not the jury will draw the inference that the bottle had some connection with this enterprise. Overruled.

MR. GRAHAM: Exception.

EXCEPTION NO. XI.

MR. GRAHAM: On account of the fact that the Government case in chief was reopened—you now rest?

MR. ROWELL: Yes

MR. GRAHAM: I now rest, and renew the motion that I made before.

THE COURT: Denied.

MR. GRAHAM: Exception.

Whereupon respective counsel for the parties hereto

argued the case to the jury and the court instructed the jury, no exceptions being saved to the instructions, and the jury retired to deliberate upon their verdict.

The defendants hereby present the foregoing as their proposed Bill of Exceptions herein, and respectfully ask that the same may be allowed.

RUSSELL GRAHAM

Attorney for Defendants

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	NO. 10454- J
VS	)	
TONY PANZICH and	)	
JOHN ARKO,	)	
Defendants.	)	

TO SAMUEL W. McNABB, United States Attorney and to MILO ROWELL, Assistant United States Attorney.

Sir:

You and each of you will please take notice that the foregoing constitutes, and is, the Bill of Exceptions of the defendants in the above entitled action, and the defendants will ask the allowance of the same.

Attorney for Defendants

STIPULATION RE BILL OF EXCEPTIONS

IT IS HEREBY STIPULATED that the foregoing Bill of Exceptions is correct and contains all of the testimony adduced at the trial, and all proceedings had therein and that the stipulations therein mentioned are correct and that the same may be settled and allowed by the Court.

Attorney for Defendants
SAMUEL W. McNABB,
United States Attorney,
By Milo E. Rowell
Assistant U. S. Attorney
Attorneys for Plaintiff

ORDER APPROVING BILL OF EXCEPTIONS

This Bill of Exceptions having been duly presented to the Court and the Court having found that the same corresponds with the facts, it is now signed and made a part of the records in this cause.

Dated Sept 10, 1932.

GEO COSGRAVE
JUDGE

[Endorsed:]

Lodged—June 2—1932 R S ZIMMERMAN, Clerk By G. J. MURPHY Deputy Clerk

Received copy of the within Bill of Exceptions this .....day of June, 1932 MILO E. ROWELL Attorney for Plaintiff

Engrossed Bill Filed Sep 10 1932 R S Zimmerman Clerk By Edmund L Smith Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,) NO. 10454-J
VS)
TONY PANZICH, et al,)
Defendants.)

ASSIGNMENT OF ERRORS

Come now Tony Panzich and John Arko, the defendants above named, and file the following statement and assignment of errors, upon which they and each of them will rely upon the prosecution of their appeal in the above entitled cause:

I.

That the Court erred in denying the motion of the defendants for an instructed verdict of not guilty, made at the conclusion of the evidence on the part of the plaintiff and appellee and renewed at the conclusion of all of the evidence.

II.

That the Court erred in reading the names of each defendant separately and required each defendant to stand after his name was read in the presence of the witnesses for the plaintiff, which witnesses were thereafter called upon to identify the various defendants after such procedure had been objected to by counsel for the defendants and after counsel for the defendants had informed the court that a question of identification of such defendants would thereafter arise during the course of the trial.

III.

That the Court erred in permitting counsel for the plaintiff to cross examine the defendant, John Arko with reference to his employment by the defendant. Tony Panzich at a cafe on East First Street, in Los Angeles, California, and with reference to the padlocking of such cafe by the United States Government.

Upon the foregoing assignment of errors and upon the record in said cause the said defendants pray that the verdict and judgment rendered therein may be reversed.

Dated this 23rd day of May, 1932.

RUSSELL GRAHAM
Attorney for Defendants

Endorsed on back: Received copy of the within assignment of errors this.....day of May, 1932.

MILO E. ROWELL
Attorney for Plaintiff

Filed May 23, 1932 R. S. ZIMMERMAN, Clerk By G. J. Murphy Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,) No. 10454-J
VS)
TONY PANZICH, et al,)
Defendants.)

PETITION FOR APPEAL

TO THE HONORABLE, THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, AND SAMUEL W. McNABB, ESQ., UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF CALIFORNIA, AND TO THE HONORABLE, THE CLERK OF THE ABOVE ENTITLED COURT:

YOU AND EACH OF YOU will please take notice that the defendants, Tony Panzich and John Arko desire to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgments and sentence heretofore, to-wit, on the 20th day of May, 1932, made and entered against said defendants in the above entitled cause, and from each and every part thereof, and present herewith their assignment of errors and pray that such appeal be allowed.

Dated this 23rd day of May, 1932.

RUSSELL GRAHAM
Attorney for Defendants

[Endorsed on back:] Received copy of within petition for appeal this.....day of May, 1932. Milo E. Rowell.
FILED: May 23, 1932 R. S. ZIMMERMAN, CLERK
By G. J. Murphy, Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	NO. 10454-J
VS	)	
TONY PANZICH, et al.,	)	
Defendants.	)	

ORDER ALLOWING APPEAL AND FIXING BOND

Upon motion of Russell Graham, Esq., attorney for the defendants Tony Panzich and John Arko in the above entitled cause, and upon filing the petition for appeal from the judgments and sentences rendered against said defendants, together with an assignment of errors;

IT IS HEREBY ORDERED that an appeal be, and the same hereby is allowed, to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgments and sentences heretofore entered herein against said defendants;

That pending the decision upon said appeal the defendant, Tony Panzich be, and he is hereby admitted to bail upon said appeal in the sum of Ten thousand and 00/100 dollars ($10,000.00); and that the said defendant, John Arko be, and he is hereby admitted to bail upon said appeal in the sum of Ten thousand and 00/100 ($10,000.00); that the bonds be conditioned that if the judgments be affirmed or the appeal dismissed the defendants will surrender themselves in execution of the judgments, will pay all fines that have been assessed against them and will abide the orders of the court.

That a cost bond be given by said defendants in the sum of Two hundred and fifty dollars ($250.00).

Dated this 23rd day of May, 1932.

GEO. COSGRAVE
Judge

Approved as to form:
Milo E. Rowell,
United States Attorney

[Endorsed on Back:] Received copy of the within Order this Day of May, 1932. Milo E. Rowell, attorney for Plaintiff

FILED: May 23, 1932 R. S. ZIMMERMAN, CLERK,
By G. J. Murphy, Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	NO. 10454-J (CRIM)
VS	)	
TONY PANZICH and JOHN ARKO,	)	
Defendants.	)	

STIPULATION AND ORDER RE CERTIFICATION OF EXHIBITS TO UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

IT IS HEREBY STIPULATED by and between counsel for the respective parties hereto that each and every of the exhibits in said cause now on file with the Clerk may be by the Clerk of the District Court of the United States, Southern District of California, sent to the United States Circuit Court of Appeals for the Ninth Circuit under a proper certificate from said Clerk in lieu of sending copies of such exhibits.

Dated this 1st day of September, 1932.

SAMUEL W. McNABB,
United States Attorney,
By Milo E. Rowell
Assistant U. S. Attorney
Attorneys for Plaintiff
Russell Graham
Attorney for Defendants and Appellants

Filed Sep 2-1932 R S ZIMMERMAN Clerk B G J MURPHY Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA	)
Plaintiff,	) NO. 10454-J (Crim)
VS	)
TONY PANZICH and JOHN ARKO,	)
Defendants.	)

ORDER RE CERTIFICATION OF EXHIBITS TO UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

Upon the stipulation by and between counsel for the respective parties hereto and good cause appearing therefor,

IT IS HEREBY ORDERED that each and every of the exhibits in said cause now on file with the Clerk may be by the Clerk of the District Court of the United States, Southern District of California, sent to the United States Circuit Court of Appeals for the Ninth Circuit under a proper certificate from said Clerk in lieu of sending copies of such exhibits.

Dated this 9th day of September, 1932.

Geo. Cosgrave

JUDGE

Endorsed on back: Received copy of within Order this 9th day of September, 1932.

S. W. McNabb,
Milo E. Rowell
Attys for Plaintiff

FILED: Sep 9, 1932 R. S. Zimmerman, Clerk. By G J Murphy Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,) NO. 10454-J
VS)
TONY PANZICH, et al,)
Defendants.)

BOND OF DEFENDANTS FOR COSTS ON APPEAL

UNITED STATES OF AMERICA,)
: SS.
Southern District of California.)

KNOW ALL MEN BY THESE PRESENTS:

That we, Tony Panzich and John Arko, as principals, and Mato Majic and Irene Johnston as surety are held and firmly bound unto the United States of America, in the sum of Two hundred and fifty dollars ($250.00) to the payment of which well and truly to be made, we jointly and severally bind ourselves, our executors, administrators and successors, firmly by these presents.

WITNESS our hands and seals at Los Angeles, California, this 23rd day of May, 1932.

WHEREAS, on the 23rd day of May, 1932, in the District Court of the United States for the Southern District of California, Central Division, sentence was pronounced on the said defendants and on the 23rd day of May, 1932, a citation was issued, directed to the United States of America, to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, pursuant to the terms and the date fixed in the said citation;

NOW, THEREFORE, the condition of the above obligation is such that if the said defendants shall prosecute said appeal and answer all damages for costs if he fail to make good his plea, then the above obligation shall be null and void; otherwise to remain in full force and effect.

Tony Panzich
John Arko
PRINCIPALS
Mato Majic
Irene Johnston
SURETY

We, the undersigned, attorneys for the said defendants, hereby certify that in our opinion the form of the foregoing bond is correct, and that the Surety thereon is qualified.

Russell Graham
Attorney for Defendants

The foregoing bond is hereby approved as to form.

SAMUEL W. McNABB,
United States Attorney
By Clyde Thomas
Asst. U. S. Attorney

The foregoing bond is hereby approved.

Geo Cosgrave
U. S. District Judge

SOUTHERN DISTRICT OF CALIFORNIA, ss:

Irene Johnston of 503 Signal Bldg., L. A. Mato Majic 4546 Michigan Ave. L. A. being duly sworn, each for himself deposes and says that he is a householder in said District, and is worth the sum of Two Hundred & fifty dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

Irene Johnston
Mato Majic

Subscribed and sworn to before me
this 23 day of May, A. D. 193
David B. Head
United States Commissioner
(SEAL)

The form of the foregoing Bond and the sufficiency of the sureties thereto is hereby approved.

David B. Head
U. S. Commissioner.

FILED MAY 23 1932
R. S. ZIMMERMAN, CLERK
By G. J. Murphy
Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	NO. 10454-J
VS	)	
TONY PANZICH, et al,	)	
Defendants.	)	

BOND PENDING DECISION UPON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, TONY PANZICH, of the City of Los Angeles, State of California, as principal and Blaz and Manda Chutuk, husband and wife; Nicola & Antonette Gesualdi, husband & wife, as sureties, are jointly and severally held and firmly bound unto the UNITED STATES OF AMERICA, in the sum of Ten thousand and 00/100 Dollars ($10,000.00), for the payment of which said sum we and each of us bind ourselves, our heirs, executors, administrators and assigns.

Signed and dated this 23rd day of May, 1932.

WHEREAS, lately, to-wit, on the 23rd day of May, 1932, at a term of the District Court of the United States, in and for the Southern District of California, Central Division, in an action pending in said Court, between the United States of America, plaintiff, and Tony Panzich, defendant, a judgment and sentence was made, given, rendered and entered against the said Tony Panzich in the above entitled action, wherein he was convicted as charged in said indictment.

WHEREAS, in said judgment and sentence, so made, given, rendered and entered against said Tony Panzich, he was by said judgment sentenced to imprisonment in the United States Penitentiary at McNeil Island for

two years and to pay a fine aggregating the sum of Ten thousand and 00/100 dollars ($10,000.00)

That said Tony Panzich, having obtained an appeal from the United States Circuit Court of Appeals for the Ninth Circuit to reverse said judgment and sentence, and a citation directed to the United States of America to be and appear for the Ninth Circuit at San Francisco, California, in pursuance to the terms and at the time fixed in said citation.

WHEREAS, said Tony Panzich has been admitted to bail pending the decision upon said appeal in the sum of Ten thousand and 00/100 dollars ($10,000.00).

NOW, THEREFORE, the conditions of the above obligations are such that if the said Tony Panzich shall appear in person or by his attorney, in the United States Circuit Court of Appeals for the Ninth Circuit, on such day or days as may be appointed for the hearing of said cause in said Court, and prosecute his appeal; and if the said Tony Panzich shall abide and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit, in said cause; and if the said Tony Panzich shall surrender himself in execution of said judgment and sentence, and will pay all fines that have been assessed against him if the said judgment and sentence be affirmed by the United States Circuit Court of Appeals for the Ninth Circuit; and if the said Tony Panzich shall appear for trial in the District Court of the United States in and for the Southern District of California, Central Division, on such day or days as may be appointed for retrial by said District Court, and abide by and obey all orders made by said District Court, if the said judgment and sentence against him be reversed by the United States Circuit Court of Appeals for the Ninth Circuit.

THEN THIS OBLIGATION TO BE void; otherwise to remain in full force, virtue and effect.

Tony Panzich
PRINCIPAL

Antonette (x her mark) Gesualdi
Nick Gesualdi
Russell Graham witness to mark of Antonette Gesualdi

Blaz Chutuk
Manda (x her mark) Chutuk
Surety
Russell Graham
witness to mark of Manda Chutuk

Endorsed on back: I hereby certify that I have examined the sureties upon the within bond and find them good and sufficient.

May 23, 1932 DAVID B. HEAD
U. S. Commissioner

Approved as to form
Clyde Thomas
Asst. U. S. Atty

FILED: May 23, 1932
R. S. ZIMMERMAN, Clerk
By G. J. Murphy
Deputy Clerk

Approved Geo. Cosgrave
U. S. Dist Judge

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF CALIFORNIA

Blaz Chutuk of 1516 Michigan Ave Los Angeles and Nicola Gesualdi of 950 Summit Ave Los Angeles being duly sworn, each for himself deposes and says:

That he is a householder in the District aforesaid, and is worth the sum of Ten Thousand Dollars, over and above all debts and liabilities, exclusive of property exempt from execution, and is the owner of the property listed below under Schedule of Assets, which schedule is made a part of this affidavit; that the said property is not encumbered except as below listed and that the property is reasonably of the value below listed, and further that he is not receiving or accepting compensation for acting as surety herein and is not surety upon any outstanding penal bonds except as disclosed in the schedule below.

(A) BLAZ CHUTUK (SEAL)
(B) NICLO GESUALDI (SEAL)

Subscribed and sworn to before me this 23 day of May 1932

DAVID B. HEAD
United States Commissioner for the Southern District of California.

SCHEDULE OF ASSETS

Surety "A" Lot 54 Tract 1212—L. A. County—per Bk 18 pp 126-127—value 15,000 clear, other real property of value approximately—$40,000

Surety "B" Lot 4 Blk X—Mount Pleasant Tract L. A. County per Bk 32 p. 58—value 12,000—no encumbrances

I hereby certify that I have examined the sureties upon the written bond and find them good and sufficient. May 23, 1932.

DAVID B. HEAD (SEAL)
U. S. Commissioner

Approved as to form
CLYDE THOMAS, Asst U. S. Atty.
BOND OF TONY PANZICH, APPROVED: GEO. COSGRAVE, U. S. Dist Judge
FILED MAY 23 1932 R. S. ZIMMERMAN, Clerk By G. J. Murphy Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	NO. 10454-J
VS	)	
TONY PANZICH, et al,	)	
Defendants.	)	

BOND PENDING DECISION UPON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, JOHN ARKO, of the City of Los Angeles, State of California, as principal and Luka and Mary Grgich husband & wife; Joseph L. and Rosa A. Misetich husband & wife - as sureties, are jointly and severally held and firmly bound unto the UNITED STATES OF AMERICA, in the sum of Ten thousand and 00/100 dollars, for the payment of which said sum we and each of us bind ourselves, our heirs, executors, administrators and assigns,

Signed and dated this 23rd day of May, 1932.

WHEREAS, lately, to-wit, on the 23rd of May, 1932, at a term of the District Court of the United States, in and for the Southern District of California, Central Division, in an action pending said Court, between the United States of America, plaintiff, and John Arko, defendant, a judgment and sentence was made, given, rendered and entered against the said John Arko in the above entitled action, wherein he was convicted as charged in said indictment.

WHEREAS, in said judgment and sentence, so made, given, rendered and entered against said John Arko, he was by said judgment sentenced to imprisonment in the United States Penitentiary at McNeil

Island, for two years and to pay a fine aggregating the sum of Five thousand and 00/100 Dollars ($5,000.00).

That said John Arko, having obtained an appeal from the United States Circuit Court of Appeals for the Ninth Circuit to reverse said judgment and sentence, and a citation directed to the United States of America to be and appear for the Ninth Circuit at San Francisco, California, in pursuance to the terms and at the time fixed in said citation.

WHEREAS, said John Arko has been admitted to bail pending the decision upon said appeal in the sum of Ten thousand and 00/100 Dollars ($10,000.00).

NOW, THEREFORE, the conditions of the above obligations are such that if the said John Arko shall appear in person or by his attorney, in the United States Circuit Court of Appeals, for the Ninth Circuit, on such day or days as may be appointed for the hearing of said cause in said Court, and prosecute his appeal; and if the said John Arko shall abide and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit, in said cause; and if the said John Arko shall surrender himself in execution of said judgment and sentence and will pay all fines that have been assessed against him if the said judgment and sentence be affirmed by the United States Circuit Court of Appeals for the Ninth Circuit; and if the said John Arko shall appear for trial in the District Court of the United States in and for the Southern District of California, Central Division, on such day or days as may be appointed for retrial by said District Court, and abide by and obey all orders made by said District Court, if the said judgment and sentence against him be reversed by the United States Circuit Court of Appeals for the Ninth Circuit.

THEN THIS OBLIGATION TO BE VOID; otherwise to remain in full force, virtue and effect.

John Arko
PRINCIPAL
Luka Grgich
Mary Grgich
Joseph L. Misetich
Rose A. Misetich
SURETY

UNITED STATES OF AMERICA,
Southern District of California.

Lika Grgich of 419 Alpine St —Los Angeles and Jos. L. Misetich of 1323 Pennsylvania Ave. Los Angeles being duly sworn, each for himself deposes and says:

That he is a householder in the District aforesaid, and is worth the sum of Ten thousand— Dollars, over and above all debts and liabilities, exclusive of property exempt from execution, and is the owner of the property listed below under Schedule of Assets, which schedule is made a part of this affidavit; that the said property is not encumbered except as below listed and that the property is reasonably of the value below listed, and further that he is not receiving or accepting compensation for acting as surety herein and is not surety upon any outstanding penal bonds except as disclosed in the schedule below.

(A) Luke Grgich (Seal)
(B) Joseph L. Misetich

Subscribed and sworn to before
me this 23 day of May 1932
DAVID B. HEAD
United States Commissioner for
the Southern District of California
(SEAL)

Schedule of Assets

Surety "A"	Surety "B"
Lot 6 Blk 37 Ords Survey L. A. County per Bk 53 p 66-73 value $16,000 clear	Lot 3 Blk 18, Tract 6110 L A County per Bk 68 p. 59-60 Lot 5 (S. 45 ft of) Blk "O" & "R" of Mt Pleasant Tract LA County per Bk 23 p 99, value $11,000 —clear

endorsed on back: I hereby certify that I have examined the sureties upon the within bond and find them good and sufficient.
May 23—132 (Seal) David B. Head
Approved as to form
Clyde Thomas, Asst. U. S. Atty.

Approved
Geo Cosgrave
U S Dist Judge

FILED May 23 1932
R S ZIMMERMAN, CLERK By GJ Murphy
Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	NO. 10454-J (CRIM)
VS	)	
TONY PANZICH and	)	
JOHN ARKO,	)	
Defendants.	)	

PRAECIPE FOR RECORD

To the Clerk of said Court:

Sir: Please prepare transcript of record to the Circuit Court of Appeals in the above entitled cause and include therein the following papers and orders:

(1) Indictment
(2) Pleas
(3) Verdicts
(4) Minutes of Trial
(5) Bill of Exceptions and order approving same
(6) Petition for appeal
(7) Order allowing appeal and fixing bond
(8) Citation
(9) Stipulation and order re certification of exhibits to Circuit Court of Appeals
(10) Stipulations and orders extending time for filing transcript on appeal and docketing same
(11) Cost bonds on appeal
(12) Bail bonds on appeal
(13) Assignment of errors
(14) Judgments and sentences
(15) Praecipe for record

Dated this 1st day of September, 1932.

Russell Graham
Attorney for Appellants

Endorsed on back: Received copy of the within Praecipe for record this 6th day of September, 1932.

Milo E. Rowell
Attorneys for Plaintiff

FILED Sep 6, 1932, R. S. ZIMMERMAN, Clerk, By G J MURPHY

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION.

UNITED STATES OF AMERICA, Appellee,	)	
VS	)	NO. 10454-C,
TONY PANZICH, et al, Appellants.	)	Criminal

STIPULATION

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties to the above entitled action that all endorsements on the covers of the various documents which constitute the transcript of record on appeal excepting the filing stamps of the Clerk of the District Court may be omitted from the said transcript of record.

DATED: This 11th day of October, 1932.

RUSSELL GRAHAM
Russell Graham
ATTORNEY FOR APPELLANTS
SAMUEL W. McNABB,
United States Attorney
By Milo Rowell
Assistant U. S. Attorney
ATTORNEY FOR APPELLEE

It is so ordered.

GEO. COSGRAVE
U. S. District Judge

Endorsed on back: FILED October 12, 1932
R. S. ZIMMERMAN, CLERK.
By Francis E. Cross,
Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	NO. 10454-J (Crim)
VS	)	
TONY PANZICH, et al,	)	
Defendants.	)	

CLERK'S CERTIFICATE

I, R. S. ZIMMERMAN, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing..... pages, numbered from 1 to.....inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the indictment; pleas; minutes of trial; verdicts; sentences; petition for appeal; order allowing appeal and fixing bond; citation, bill of exceptions and order thereon; assignment of errors; stipulation re certification of exhibits; order re certification of exhibits; cost bond; bail bonds on appeal; praecipe for record, and stipulation and order re printing.

I do further certify that the amount paid for printing the foregoing record on appeal is $.....and that said amount has been paid the printer by the appellants herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing record on ap-

peal amount to.....and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this.....day of October, in the year of Our Lord One Thousand Nine hundred and Thirty-two, and of our Independence the One Hundred and Fifty-sixth.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California,

By

Deputy.

No. 6998.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Tony Panzich and John Arko,
Appellants,

vs.

The United States of America,
Appellee.

APPELLANTS' OPENING BRIEF.

RUSSELL GRAHAM,
Bank of America Bldg., 7th and Spring, L. A.,
Attorney for Appellants.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

INDEX TO APPENDIX.

No. 6998.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Tony Panzich and John Arko,
Appellants,

vs.

The United States of America,
Appellee.

APPELLANTS' OPENING BRIEF.

The appellants, Tony Panzich and John Arko, together with Nick Jurash, Joe N. Wilson and Tony Govarko, were tried upon an indictment charging them with having unlawfully conspired, in violation of section 37 of the Federal Penal Code, to commit certain offenses against the United States, by selling and possessing large quantities of intoxicating liquor in violation of section III, Title II of the National Prohibition Act and, in furtherance of said conspiracy, with having committed certain overt acts, set forth in the indictment. [Tr. pp. 2, 3, 4.]

Nick Jurash and Tony Govarko were acquitted. Joe N. Wilson and the appellants, Tony Panzich and John

Arko, were convicted. Sentence was then imposed as follows: The defendant, Joe N. Wilson was placed on probation for a period of three years; the appellant, Tony Panzich was sentenced to imprisonment in the United States penitentiary at McNeil Island, Washington, for the term and period of two years and to pay a fine of five thousand dollars and to stand committed to the said penitentiary until said fine be paid; and the appellant, John Arko, was sentenced to imprisonment in the United States penitentiary at McNeil Island, Washington, for the term and period of two years and to pay a fine in the sum of one thousand dollars and to stand committed to the said penitentiary until said fine be paid. [Tr. pp. 17, 18.]

From the judgments and sentences so imposed, the appellants Tony Panzich and John Arko have appealed.

STATEMENT OF FACTS.

The testimony shows that Thomas Robinson, as secretary-manager of the Elks Club in Santa Monica, California, leased to the appellant, Tony Panzich, the cafe premises at 3003 Main street, in Santa Monica, which was in the Elks Building, by a written lease, together with all furniture, furnishings, dishes, silverware, linens, and cafe equipment and also a storeroom in the same building, said lease to commence on the 18th day of August, 1930, and to end on the 18th day of August, 1931, the aggregate rental being $2820.00, payable $470.00 upon the acceptance and signing of the lease and $235.00 per month in advance for each of the succeeding ten months. The testimony of Robinson also shows that the appellant, Panzich, entered into possession of the premises a few days prior to August 18, 1930, and occupied the premises

continuously until the 15th day of September, 1931, and that during this period appellant, Panzich, paid the rent for the premises to Robinson. [Tr. pp. 42, 43.] The testimony also shows that, at the time of the execution of the lease, there was no one present except Mr. Robinson and the appellant, Tony Panzich, and that no one else entered into the negotiations of the lease. [Tr. p. 44.]

The testimony further shows that at the time of the execution of this lease between the appellant, Panzich, and the Elks Lodge, the appellant Panzich delivered to Mr. Robinson, apparently as security for the faithful performance of the lease, a grant deed executed by Title Guarantee & Trust Company, conveying certain real property to John Arkovich, John Panzich and Tony Panzich, which deed has never been placed of record. [Tr. p. 44.]

S. W. Brooks, a federal prohibition agent, testified that he first visited the cafe in Santa Monica, known as Tony's Good Fellows Inn, on April 30, 1931. This was the cafe which the appellant, Panzich, had theretofore leased from the Elks Club. Brooks had three companions with him on that trip. He testified he did not know who they were, but that one of them had come into the federal prohibition office and had arranged to take him, Brooks, to the cafe and that before arriving at the premises they had met the two other parties. Brooks testified that upon entering the cafe the person who took him there introduced him to Mr. Panzich, after which Brooks and his companions, two of whom were women, were escorted to a table in a booth by the appellant, John Arko. Brooks testified [Tr. p. 22] that after Arko had escorted them to a booth and closed the curtains, he asked them what they wanted and Brooks ordered a pint of whiskey from

Arko, who returned in about two minutes with a pint of whiskey. He testified that another waiter took the order for the food. Brooks testified that he drank one glass of the whiskey and retained the other part. This bottle was introduced in evidence as Government's Exhibit No. 1. [Tr. p. 23.]

Brooks testified that, when they left the cafe, he took the bottle with him and paid the bill presented to him by the waiter, on the bottom of which was an item "B R K $2.00".

Brooks further testified that he next visited the premises on May 4th in company with prohibition agent Casey; that he and Casey were taken to a booth in the same manner by a waiter whom he identified as the defendant, Nick Jurash; that the appellant, John Arko, and the defendant, Nick Jurash, were present at the booth and that Casey ordered some liquor and that in about two minutes Arko returned with a pint of whiskey and handed it to Casey and they drank one glass of it and retained the rest; that they also ordered food that evening and received a statement, with the food itemized at the top and an item at the bottom "B R K $2.00". [Tr. p. 24.] That he later took from the cash register a number of statements upon which were items such as "B R K $2.00", "B R K $3.00", or " B R K $5.00". [Tr. p. 24.]

Brooks further testified that on May 13 he again visited the cafe with Agent Casey; that they were escorted to a booth; that a waiter took their orders for food; that Casey ordered a pint of liquor and that, after it was delivered, Casey ordered a bottle of wine, which was delivered. That he could not state who delivered the pint

of liquor on the 13th, but that Arko delivered the wine. That when they received their statement the food was itemized and there was two items "B R K $2.00" for the whiskey and "B R K $2.50" for the wine. That the bill was paid by agent Casey.

Brooks further testified that he went into the premises on May 15, accompanied by Agents Casey, Waite, Clemens, McDonald and Banta. That Casey and Waite first went into the premises and that Casey and himself went in about thirty minutes later, at which time all of the defendants and Mrs. Panzich were present. That when he and Casey entered Casey and Waite had placed the defendant, Joe N. Wilson, under arrest. That they then arrested Panzich and the other defendants upon warrants which had been previously issued. That they also had with them a search warrant, under authority of which they searched the premises and found a bottle of wine in the safe. [Tr. p. 25.] Brooks further testified that he saw Panzich in the cafe on two occasions when he was there. [Tr. p. 31.]

Prohibition Agent Casey testified that the first time he went into the cafe was on May 14, 1931, in company with Mrs. Casey and Agent Brooks. That the defendant Govarko conducted them to the booth and that Brooks was greeted by the appellant, Arko. That Govarko waited on their table and that they ordered a pint of whiskey from Govarko. That Govarko said, "All right" and walked away and that Arko then came to the booth and the order was repeated to him. That Arko then said, "All right" and that in a few minutes, he, Arko, came back to the booth with a pint of whiskey, which he delivered to them. That he, Casey, had a conversation with

Arko about the price of whiskey. That Arko said they had two grades of whiskey, one at $5.00 a pint and one at $2.00 a pint, and that he, Casey, purchased a $2.00 a pint. That he paid the amount of the bill to the waiter who served the food and that, in addition to the food, there was an item on the bill "B R K $2.00".

Casey further testified that on May 13th he visited the cafe with the same persons. That the defendant, Jurash, conducted them to a booth. That they ordered a pint of whiskey and Arko, whom they sometimes called Kelley, came to the booth. That, as Arko brought the whiskey, they ordered a quart of wine from him, which he brought. That the bill, presented by the waiter, listed the food, with its charges; it also listed $2.00 for the liquor and $2.50 for the wine, the amount of which they paid to the waiter. Casey further testified that he next went to the premises May 15th, accompanied by Mrs. Casey and Agent Waite. That Wilson conducted them to a booth and that they ordered some whiskey and that Arko came in and returned with the whiskey. That Wilson served the food. That after they were through eating he paid Wilson. That Wilson took the money out of his pocket to make change and laid the change on the table, after which Wilson was placed under arrest. That Wilson did not take the bill nor the money given him by Casey to the cash register. That when they called for the bill, as a pre-arranged signal, Mrs. Casey left the premises and the other agents entered and placed the other defendants under arrest. That in the back of the premises in a bin they found several empty bottles and cases for whiskey bottles and a pint liquor bottle practically full. [Tr. p. 35.] That the bin in which these

bottles were found was next to the rear of the outside wall of the building, but not in the building. That, in addition to the cafe, there were other things in the building, including a store or two and the Santa Monica Elks Club. [Tr. p. 39.]

The testimony of Agent Waite was practically to the same effect as that of Casey as to the visit of May 15, 1931, except that Waite was unable to identify the person whom he testified came to the booth with the pint bottle. [Tr. p. 42.]

Earl G. Bleak, the manager of the Ocean Park branch of the Security-First National Bank, testified that an account was carried in that bank under the name of Tony Panzich and that checks on the account were signed "Tony's Good Fellows Inn, by Tony Panzich," and that no one else was authorized to draw on that account. [Tr. p. 46.]

The defendant, Jurash, testified that he first met the appellant, Tony Panzich, on May 14, 1931, and was employed by Panzich to commence work in the cafe as a waiter and was instructed to report for duty the next day, which he did. That May 14 was the first day he had ever been in that cafe. [Tr. pp. 47, 48.] His testimony was corroborated by the testimony of N. B. Restovich, who testified that he took Jurash to the cafe on May 14, 1931, and introduced him to Panzich and that he knew that Jurash had not been working in that cafe prior to that time. [Tr. pp. 49, 50.] His testimony was further corroborated by Mrs. Katie Jurash, his wife, Lena Jurash, his daughter [Tr. pp. 51, 52, 53], and by John Muhn, his next-door neighbor. [Tr. pp. 53, 54.]

The defendant Wilson denied that he sold or served any whiskey or intoxicating liquors. He denied that the defendant Govarko, was employed in the cafe and testified that Govarko was present in the cafe as a customer at the time of the arrest and that he (Wilson) had waited on Govarko shortly before the arrest. That he was not personally acquainted with Govarko [Tr. pp. 54, *et seq.*] The defendant, Govarko, testified that in the month of May, 1931, he was employed by a contractor who built houses. That he had never been employed as a waiter and had never been employed at Tony's Good Fellows Inn. That on May 15, the date of the arrest, he went into the cafe and visited with two friends who were employed there as a waiter and cook, respectively. That he was not present at the cafe April 30, May 4 or May 13, 1931. [Tr. pp. 59, 60, 61.]

Govarko's testimony was corroborated by William Austin, who testified he was a general construction contractor and that the times in question the defendant, Govarko, had been employed by him. The testimony of Govarko was further corroborated by Joseph Pavolovich and by Winfield Husted, both of whom testified that they were also employed by Austin and that, at the times in question, Govarko had been so employed and was actually engaged in working for Mr. Austin with them. [Tr. pp. 63, 64.]

The appellant, Arko, testified that his true name was John Arkovich. That he was employed in Ocean Park at Tony's Good Fellows Inn as head waiter. That the defendant Jurash first went to work at the cafe on May 15, the day of the arrest. That he had never worked there before. That the defendant Govarko had never

worked in the cafe, but was present in the cafe as a customer at the time of the arrest. [Tr. pp. 65, 66.] Arko also denied that he had ever sold any liquor of any kind in the cafe. He further testified that he was not Panzich's partner, but was merely an employee in the cafe. He testified that the deed which Panzich gave to Robinson at the time of the execution of the lease was a deed to himself, Tony Panzich and John Panzich for certain real property which they had bought together six years before. [Tr. pp. 65, 66, 67.]

CONTENTIONS OF APPELLANTS.

The appellants contend:

1. That the court erred in denying the motion of the defendants for an instructed verdict of not guilty, made at the conclusion of the evidence on the part of the plaintiff and appellee and renewed at the conclusion of all of the evidence.

2. That the court erred in reading the names of each defendant separately and requiring each defendant to stand after his name was read in the presence of the witnesses for the plaintiff, which witnesses were thereafter called upon to identify the various defendants, after such procedure had been objected to by counsel for the defendants and after counsel for the defendants had informed the court that a question of identification of such defendants would thereafter arise during the course of the trial.

3. That the court erred in permitting counsel for the plaintiff to cross-examine the defendant, John Arko, with reference to his employment by the defendant, Tony Pan-

zich, at a cafe on East First street, in Los Angeles, California, and with reference to the padlocking of such cafe by the United States Government.

These contentions are based upon the assignment of errors contained at page 83 of the transcript and will be discussed separately.

ARGUMENT.

That the Court Erred in Denying the Motion of the Defendants for an Instructed Verdict of Not Guilty, Made at the Conclusion of the Evidence on the Part of the Plaintiff and Appellee and Renewed at the Conclusion of All of the Evidence.

This assignment raises the question of the sufficiency of the evidence to support the verdict of guilty as to these appellants. It must first be noted that the appellants were not charged with violating the National Prohibition Act, but were charged with conspiracy. The only evidence in this record directly connecting the appellant, Panzich, with any intoxicating liquor was the testimony of Agent Brooks to the effect that, at the time of the arrest of the defendants, he found a bottle of wine in the safe, which was opened by Panzich. [Tr. pp. 30, 31, 42.] The fact that this single bottle of wine was locked in the safe, which was apparently under the exclusive control of Panzich, negatives the idea that the bottle was kept by Panzich in furtherance of a conspiracy to sell or possess it. Rather, it would tend to indicate that Panzich had this bottle of wine for his own personal use and there is no testimony that anyone else in the cafe knew of its existence. Although there was some testimony to the effect that on one occasion a bottle

of wine had been purchased in the cafe, and had been consumed on the premises by the officers who purchased it, there is no testimony to the effect that it was wine of a similar kind or character to that found in the bottle in the cafe.

The only other liquor found at the time of the search by the officers was found in a bin outside the building next to the outside wall of the building. The best description of the location of this bin is found in the testimony of Lawrence H. McDonald. [Tr. p. 77.] His testimony in this connection is as follows: "Just on the outside of the back door, as you go out the back door there is a number of bins there, I should say four or five. They are back right against the building. I would say you have to travel four or five feet before you come to one of those bins. I made a search of those bins and Agent Casey assisted me. I recall one of the bins had—one had coal in it, and the bin next to the door had several empty bottles and empty cardboard cartons in it, and either the first or the second bin from the door, Agent Casey found a pint of whiskey in it. I was with him at the time it was found. Government's Exhibit 6 is the bottle that was found by Agent Casey. I have my initials and handwriting there as identification marks. Off the back of the kitchen there is a hallway that runs through to some storerooms in the back of the building, and then off this hallway there is another hallway that runs to the back door that opens into the auto park next door to the building." On cross-examination McDonald testified as follows:

> "Q. You say the back door of the kitchen opens into a hall? A. There is a hallway opens off the kitchen and goes to the storerooms in the back of the building.

Q. And then there is another hall back of that? A. No, there is a hall that turns off at right angles to that. To the best of my memory it's about 8 or 10 feet from the kitchen, turns at right angles and goes to the back door.

Q. And these bins were near that back door? A. Yes, sir.

Q. And also near that back door was the auto park? A. Yes, sir.

Q. Well, at least back of the back door was an open space? A. Yes.

Q. And there was an auto park there? A. Yes."

It is a significant fact that all of the bottles, which the Government witnesses testified were bought in the cafe were of one kind and that the bottle which was found in the bin in the rear of the building was of a different kind, which an examination of the exhibits themselves will disclose. It is also a significant fact that the cafe was not the only enterprise conducted in the building. In addition to the cafe, the building contained the Santa Monica Elks Club and two stores. The only other testimony tending in any way to connect the appellant, Panzich, with the sale of any liquor was that he was the proprietor of the cafe (and the appellants concede that the evidence is sufficient to show this) and that on certain bills, or statements, which were found in the cash register were "B R K" items.

There is no testimony whatever to show that any liquor was ever ordered from, sold, or delivered by or paid

for, to or in the immediate presence of the appellant, Panzich, and the testimony shows that he was present at the cafe on two occasions, only, when witnesses testified to purchasing liquor, one of which was April 30th, at the time of the first visit by Agent Brooks, and the other of which was May 15, the day of the arrest. No witness testified that he had any discussion with Panzich about the sale of liquor. Agent Brooks also testified [Tr. p. 28]: "This cafe was a completely equipped restaurant. It sold food, almost any kind of food you wanted to order. I don't know anything about the stock, the equipment was there. Any kind of food you ordered you always got and there was quite a considerable selection on the menu. As I recall, it was very good food." This testimony shows that Panzich was actually conducting a *bona fide* restaurant, not merely a place as a blind to cover sales of liquor.

Assuming, for the purpose of argument, but not conceding, that the testimony of the prohibition agents as to the purchase of liquor in the cafe from certain waiters was true, the evidence is just as consistent with the theory that these waiters were selling liquor without the knowledge or consent of the proprietor as it is with the theory that they were selling liquor to the patrons of the cafe, whom they served with food, pursuant to a conspiracy theretofore entered into between themselves and Panzich.

While it is undoubtedly true that a conspiracy or any other offense may be proved by circumstantial evidence, yet the circumstances must be such as to show beyond all reasonable doubt the guilt of the accused. The legal presumption is that the defendants are not guilty; and unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused, and where all of the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction.

Vernon v. U. S. (C. C. A.), 146 F. 121, 123, 124;
Wright v. U. S. (C. C. A.), 227 F. 855, 857;
Edwards v. U. S. (C. C. A.), 7 F. (2d) 357, 360;
Siden v. U. S. (C. C. A.), 9 F. (2d) 241, 244;
Ridenour v. U. S. (C. C. A.), 14 F. (2d) 888, 893;
Haning v. U. S., 21 F. (2d) 508, 510;
Sugarman v. U. S., 35 F. (2d) 663 (C. C. A. 9);
Connelly v. U. S., 46 Fed. (2d) 53.

Even if this court believes that there is sufficient evidence to show that Panzich aided or abetted in sales of liquor, that of itself is not sufficient to show the existence of a conspiracy.

> "The courts are not authorized to hold as a matter of law that one who aids and abets another in the commission of the offense is a conspirator."
>
> *Louie v. U. S.,* 218 Fed. 36.

In the case of *Dickerson v. United States,* 18 Fed. (2d) 887, the court said:

> "Wherever a circumstance relied on as evidence of criminal guilt is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though from the other inference guilt may be fairly deducible. To warrant a conviction for conspiracy to violate a criminal statute, the evidence must disclose something further than participating in the offense which is the object of the conspiracy; there must be proof of the unlawful agreement, either express or implied, and participation with knowledge of the agreement. (Linde v. U. S., 13 F. (2d) 59 (C. C. A. 8th Cir.); U. S. v. Heitler *et al.* (D. C.), 274 F. 401; Stubbs v. U. S. (C. C. A. 9th Cir.), 249 F. 571, 161 C. C. A. 497; Bell v. U. S. (C. C. A. 8th Cir.), 2 F. (2d) 543; Allen v. U. S. (C. C. A.), 4 F. (2d) 688; U. S. v. Cole (D. C.), 153 F. 801, 804; Lucadamo v. U. S. (C. C. A.), 280 F. 653, 657.)
>
> The mere fact that the plaintiffs in error purchased liquor from the conspirators is not sufficient to establish their guilt as conspirators. The purchaser may be perfectly innocent of any participation in the conspiracy. The gist of the offense is the conspiracy, which is not to be confused with the acts done to effect the object of the conspiracy. (Iponmatsu Ukichi v. U. S. (C. C. A.), 281 F. 525.)"

The evidence in this case has no greater effect than to raise a mere suspicion that the appellant Panzich might have been connected with the conspiracy charged in the indictment.

II.

That the Court Erred in Reading the Names of Each Defendant Separately and Requiring Each Defendant to Stand After His Name Was Read in the Presence of the Witnessses for the Plaintiff, Which Witnesses Were Thereafter Called Upon to Identify the Various Defendants, After Such Procedure Had Been Objected to by Counsel for the Defendants and After Counsel for the Defendants Had Informed the Court That a Question of Identification of Such Defendants Would Thereafter Arise During the Course of the Trial.

At the opening of the trial the following procedure took place:

"The Clerk: United States v. Tony Panzich, Nick Jurash, Joe N. Wilson, John Arko and Tony Govarko.

Mr. Graham: The defendants are ready and are present in court.

The Court: Very well.

The Clerk: Will the defendants step forward?

Mr. Graham: But I don't want their names called, to have them step forward, because there may be a question of identity and I don't think it would be fair. I assure the court they are all here.

The Court: Well, what is the idea?

Mr. Graham: If it becomes necessary for any Government witness to point out which defendant is which defendant, I don't think they should have that done for them by the clerk before they have to do it.

The Court: Well, let the defendants take their places in the regular way, and we will decide it in the regular way when we get to it.

Mr. Graham: Those are all of the defendants and they are all present.

The Court: Proceed.

The Clerk: May I call the roll, Your Honor?

The Court: Yes.

The Clerk: This is Judge James' jury.

The Court: Yes.

(Clerk calls roll of the jury.)

The Court: Fill the box.

(Whereupon twelve jurors took their seats in the jury box.)

The Court: The case this morning, gentlemen, is an indictment against Tony Panzich. Stand, please.

Mr. Graham: If the court please, before this is done, I would like to ask if the Government witnesses are in the room?

The Court: Well, I don't know. He will stand if he is present.

(The defendant Tony Panzich arises.)

Mr. Graham: Let the record show that I object to this procedure, and note an exception.

The Court: Yes.

Nick Jurash, Joe N. Wilson, John Arko and Tony Govarko.

(The foregoing named defendants arose.)

The Court: That's sufficient. Sit down, gentlemen.

(All defendants became seated.)

The Court: Those are the defendants."

The appellants concede that there is no error in requiring a defendant to stand upon being identified by

a witness, so that the jury may see which defendant has been identified, but where, as here, there is a serious question of identification involved, the appellants respectfully contend that it is most unfair for the court to call the names of the defendants and to require each defendant to stand as his name is called, without first excluding from the court room those witnesses who will thereafter be called upon to identify the defendants as the persons whom the witnesses will say they saw on previous occasions. In other words, the appellants contend that they were deprived of a fair trial by the action of the court in first identifying the defendants individually to the officers and in permitting the officers to take the stand and identify the defendants to the jury.

The record, as hereinbefore quoted, shows that the appellants, through their counsel, made timely and proper objections and exceptions to this mode of procedure. It must be noted that it was called to the attention of the trial court that a question of identification would arise and that appellants had no objection to answering to their names in the presence of the jury but that the appellants requested the court to exclude the Government's witnesses from the court room before following this procedure. This the court refused to do.

After having the various defendants identified for them, the prohibition agents identified Jurash as a waiter who had served liquor to them on various occasions prior to May 15, 1931, and the testimony of Jurash and other witnesses clearly shows that Jurash was first employed in this cafe on May 15, 1931. That this fact was established to the satisfaction of the jury is shown by the verdict acquitting Jurash.

Also, after having had the defendant Tony Govarko identified for them by the court, the Government witnesses identified Govarko as a waiter who had sold and served them liquor on various occasions prior to May 15, 1931. The testimony also clearly shows that Govarko was never employed in the cafe and that at the times in question he was employed as a laborer by William Austin, a contractor, and was present in the cafe on the evening of May 15 only as a customer. That this fact was clearly established to the satisfaction of the jury is shown by the verdict acquitting Govarko. The testimony of these officers shows one of two things: either that their recollection of faces and events was so hazy as not to be worthy of credence, or that, on the evening of May 15, 1931, they went into the cafe in Santa Monica for the purpose of arresting Panzich and four other persons whom they might find in his cafe, without being greatly concerned over the identity of the persons who were thereafter to become Panzich's co-defendants.

In view of the peculiar identifications of Jurash and Govarko, the prejudice resulting to Arko by having the court identify him to the witnesses so that they might thereafter identify him to the jury is obvious.

In spite of a diligent search through the authorities, the appellants have been unable to find any case where a similar procedure has been followed, but the prejudice resulting from such a procedure is so apparent that the citation of authorities seems unnecessary.

III.

That the Court Erred in Permitting Counsel for the Plaintiff to Cross-Examine the Defendant, John Arko, With Reference to His Employment by the Defendant, Tony Panzich, at a Cafe on East First Street, in Los Angeles, California, and With Reference to the Padlocking of Such Cafe by the United States Government.

The appellant, John Arko, who testified that his true name was John Arkovich, also testified that he was head waiter at Tony's Good Fellows Inn at Ocean Park. That he started to work there at the time the place was opened. It was about the 17th or 18th of August, 1930. That Tony Panzich, the proprietor of the cafe, hired him to work there and that his duties were to seat people as they came in. That he didn't wait on the tables. That he was acquainted with Nick Jurash and first met him on the night of May 14th at the cafe and that Jurash was there on May 15, the date of the arrest, on which date Jurash first went to work in the cafe. That he was acquainted with Tony Govarko. That Govarko never worked in the cafe. That he saw him there on the day of the arrest. That he never sold whiskey nor served whiskey to any of the prohibition agents who had testified for the Government. That he might have seen them in the cafe, but didn't remember seeing them before he was placed under arrest. [Tr. pp. 65, 66.]

On cross-examination the United States Attorney was not only permitted, but was directed by the court, to cross-examine this appellant concerning matters which were entirely without and beyond the scope of his direct examination and to wrest from this appellant the testi-

mony that he had formerly worked for the appellant, Tony Panzich, in a cafe on First street, Los Angeles, approximately one year before the date of the offense charged in this indictment and that that cafe in Los Angeles had been padlocked and closed by Federal officers. In order that the court may see that these matters were not proper cross-examination and were highly prejudicial the entire testimony of Arko, both direct and cross, is set forth in full in an appendix to this brief.

The rule is very strict and is definitely established in the Federal courts that the party on whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination and that a violation of this right is reversible.

> *Illinois Cent. R. R. Co. v. Nelson,* 212 Fed. 69;
>
> *Harrold v. Territory of Okla.,* 169 Fed. 47, 52, 94 C. C. A. 415;
>
> *Resurrection Gold Mining Co. v. Fortune Gold Mining Co.,* 129 Fed. 668, 674, 64 C. C. A. 180.

In the case of *Harrold v. Territory of Oklahoma, supra,* the court said:

> "When he (the defendant) testifies as a witness he waives this privilege of silence, and subjects himself to cross-examination and impeachment to the same extent as any other witness would subject himself thereto in the same situation, but no farther. He may be cross-examined upon the subjects of his direct examination, but not upon other subjects. * * *."

See, also:

Heard v. U. S., 255 Fed. 829, 833;

Feener v. U. S., 249 Fed. 425;

Farley v. U. S., 269 Fed. 721.

In *Beyer v. United States,* 282 Fed. 225, the indictment charged that the defendant "unlawfully, wilfully and knowingly did have in his possession for the purpose of sale and did sell a quantity of intoxicating liquor" on June 19, 1920. The defendant testified on his direct examination that he did not sell any liquor that date, June 19, 1920, and had not sold any "since the time prohibition started". Under cross-examination he testified that he had not had any liquor in his place, 139 Halsey street, Newark, New Jersey, since the first day of July, 1919, when prohibition went into effect. He was then asked by the United States Attorney if he recalled a seizure of liquor on March 10, 1920. An objection was made to the question and after some discussion, in which defendant's counsel stated that he had not asked him anything on direct examination that happened prior to June 19, 1920, the court said:

> "He (the defendant) said to the District Attorney that he had nothing there from the time prohibition went into effect and now, he is asking him about that. I think it is perfectly proper."

The defendant then answered that he might have had a bottle in his place that day for himself. On appeal, the court said:

> "Possession is a crime separate and distinct from the crime of the sale of liquor. Consequently, in the trial of the defendant for the sale of liquor in his

cafe at 139 Halsey street, Newark, on June 19, 1920, it was immaterial whether or not defendant had liquor in his possession there at some previous time. The existence or non-existence of that fact would not prove or disprove the issue on trial."

The court further said:

"Possession at some other time was irrelevant and immaterial to the issue, and the United States Attorney was bound by defendant's answer. In testifying, a defendant subjects himself to the same liabilities and is entitled to the same privileges as other witnesses. (State v. Sprague, 74 N. J. Law, 419, 425, 45 Atl. 788.)

While proof of the possession of liquor at another time was collateral and immaterial, so far as establishing the issue on trial was concerned, its effect upon the jury was detrimental and prejudicial to the defendant. Evidence that he committed other crimes at other times may not be admitted to show that he had it within his power and was likely to commit the particular crime with which he was charged. (Citing cases.) It is easy to see how such evidence might prejudice the jury, render a fair trial impossible, and lead to a conviction. We are therefore constrained to reverse this case and grant a new trial."

In *Paquin v. U. S.*, 251 Fed. 579, the defendant was charged with violations of the Harrison Drug Act. After the plaintiff had rested its case and the examination of the defendant in his own behalf was closed, the court permitted the United States Attorney to prove by him, on his cross-examination, over the objection of his counsel, that, when a United States officer stated to him that

he was about to report him and did not know whether or not he should arrest him for an offense alleged to have been committed many months after the date when those on trial were alleged to have been committed, the defendant told him that his daughter was in bed about to be confined, that he was expecting a call any minute and asked him to defer the report and arrest and offered him $50.00 if he would defer them two days.

In this case the court said:

> "The defendant had not testified in his examination in chief in any way about this alleged offer to bribe, and the questions relative thereto, propounded by the attorney for the United States, were not proper cross-examination. The receipt of this evidence and the argument upon it were clearly injurious to the defendant, and a fatal error, which compels a reversal of the judgment, and renders the discussion and decision of other alleged errors immaterial."

In *Tucker v. United States,* 5 Fed. (2d) 818, the defendants were charged with using the mails in furtherance of a scheme to defraud. One of the defendants was called as a witness in behalf of the defendants. He testified to the plan he had worked out for operating road motion picture shows, and to what he stated to prospective employees and to his good faith in the matter. He at no time in any way mentioned or referred to the advertisements or the insertion of the same in the newspaper. He made no reference to the statements concerning the advertisements testified to by the persons who called upon him in response to advertisements. In short, his direct testimony went wholly to the refutation of the

first element of the offenses charged, namely, the scheme to defraud, and at no time went to the question of using the postoffice in furtherance of any such scheme. On cross-examination he was asked if he inserted or caused the insertion of the advertisements charged in the first four counts of the indictment. Objection was interposed to the effect that such questions were outside the scope of the direct examination, were therefore improper cross-examination and, in effect, made him the Government's witness, and compelled him to be a witness against himself. In commenting upon the assignment of error predicated upon the above cross-examination, the court said:

> "By the Act of March 16, 1878, 20 Stat. 30 (Comp. St., sec. 1465), Congress provided that 'the person so charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him'. What is the effect of the defendant availing himself of this statute and testifying in his own behalf upon the privilege guaranteed to him by the Fifth Amendment? All courts recognize that he subjects himself to cross-examination. So far as we have been able to determine no court or legal writer has suggested that after the accused has testified in his own behalf he can be called as a witness against himself by the prosecution. If the accused testifies in his own behalf, manifestly his testimony should be subjected to the same tests for determining its truthfulness as that of any other witness. The primary purpose of cross-examination in the Federal courts is to test the truth of the testimony adduced by the direct examination and to clarify or explain the same. It is not to prove independent facts in the case of the cross-examining party.

If there is good reason why a defendant should not be compelled to be a witness against himself, there ought to be equally good reason why, if he has testified voluntarily upon one issue, he should not be compelled to testify against his will concerning matters wholly unrelated to that issue, which would not be within the scope of proper cross-examination if he were an ordinary witness.

We conclude that, when a defendant in a criminal case voluntarily becomes a witness in his own behalf, he subjects himself to cross-examination and impeachment to the same extent as any other witness in the same situation, but he does not subject himself to cross-examination and impeachment to any greater extent. (Harrold v. Territory of Oklahoma (C. C. A. 8), 169 F. 47, 94 C. C. A. 415, 17 Ann. Cas. 868; Paquin v. U. S. (C. C. A. 8), 261 F. 579, 163 C. C. A. 573; Fitzpatrick v. U. S., 178 U. S. 304, 315, 316, 20 S. Ct. 944, 44 L. Ed. 1078; Sawyer v. U. S., 202 U. S. 150, 165, 25 S. Ct. 575, 50 L. Ed. 972, 6 Ann. Cas. 269.)"

The court further said:

"The rule fixing the limitation upon the cross-examination of a witness generally in the national courts is stated in Heard v. U. S. (C. C. A.), 255 F. 829, at page 833, 167 C. C. A. 157, 161, as follows:

'The rule on this subject in the national courts is that the party in whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination, and a violation of this right is reversible error. If the cross-examination would inquire of the witness concerning matters not opened on direct examination, he must call him

in his own behalf. (Philadelphia & Trenton Railway Co. v. Stimpson, 39 U. S. (14 Pet.), 448, 460, 10 L. Ed. 535; Houghton v. Jones, 1 Wall. 702, 706, 17 L. Ed. 503; Resurrection Gold Mining Co. v. Fortune Gold Mining Co., 129 Fed. 668, 674, 64 C. C. A. 180, and cases there cited; Illinois Central Railway Co. v. Nelson, 212 Fed. 69, 74, 128 C. C. A. 525; Harrold v. Territory of Oklahoma, 169 Fed. 47, 52, 94 C. C. A. 415, 17 Ann. Cas. 868.)'

See, also, Camp Mfg. Co. v. Beck (C. C. A. 4), 283 F. 705, 706.

The rule is the same in civil and criminal cases. (Greer v. U. S. (C. C. A. 8), 240 F. 320, 323, 153 C. C. A. 246.)"

In an early case from this circuit the court held that an unlimited cross-examination of defendant to show that he was a person of bad character or had committed other offenses was improper.

Allen v. U. S., 115 Fed. 3, 11.

In the case of *Haussener v. United States,* 4 Fed. (2d) 884, the court held that it was error requiring a reversal for the trial court to permit the prosecuting attorney, on cross-examination of a defendant, to question him as to his prior convictions of violations of the Volstead Act or of a violation of a city ordinance.

In *Wilson v. United States,* 4 Fed. (2d) 888, the Circuit Court reversed a conviction because the trial court permitted the defendant to be cross-examined upon matters not touched upon in her direct examination.

In the case of *Coulston v. United States,* 51 Fed. (2d) 178, the prosecuting attorney was permitted, on cross-

examination of the defendant, to inquire into a controversy between defendant and the narcotic agent, involving transactions which occurred some thirteen months after the offense for which he was on trial, although this matter had not been touched upon in the direct examination. In this connection the court said:

> "In our judgment this was prejudicial error. The issue presented was a simple one: Did defendant negotiate the sale on January 20, 1929, as testified to by two Government witnesses, or was he an innocent bystander, as he testified. These remote and disconnected transactions had no evidentiary bearing on this issue; at best they could serve but to create an atmosphere of hostility and to distract the attention of the jury from the issue.

The court further said:

> "In the civil law, and very early in the common law, evidence of other crimes was admitted on the theory that a person who has committed one crime is apt to commit another. The inferences is so slight, the unfairness to the defendant so manifest, the difficulty and delay attendant upon trying several cases at one time so great, and the confusion of the jury so likely, that for more than two hundred years it has been the rule that evidence of other crimes is not admissible. (Boyd v. United States, 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077; Hall v. U. S., 150 U. S. 76, 14 S. Ct. 22, 37 L. Ed. 1003; Niederluecke v. United States (C. C. A. 8), 21 F. (2d) 511; Cucchia v. U. S. (C. C. A. 5), 17 F. (2d) 86; Smith v. United States (C. C. A. 9), 10 F. (2d) 787; Wigmore on Evidence (2nd Ed.), sec. 194.) *Corpus Juris* cites cases from forty-four American jurisdictions in support of this rule. (16 C. J. 586.)

* * * It may, however, be said that, subject to possible variants so arising, it is well settled in criminal cases in the Federal courts that cross-examination must be confined to the subjects of the direct examination (Philadelphia & Trenton R. R. Co. v. Stimpson, 39 U. S. (14 Pet.) 448, 10 L. Ed. 535; Sawyer v. U. S., 202 U. S. 150, 26 S. Ct. 575, 50 L. Ed. 972, 6 Ann. Cas. 269; McKnight v. United States (C. C. A. 6), 122 F. 926; Resurrection Gold Mining Co. v. Fortune Gold Mining Co. (C. C. A. 8), 129 F. 668; Harrold v. Oklahoma (C. C. A. 8), 169 F. 47, 17 Ann. Cas. 868; Illinois Central R. R. Co. v. Nelson (C. C. A. 8), 212 F. 69; Hendrey v. United States (C. C. A. 6), 233 F. 5; Heard v. United States (C. C. A. 8), 255 F. 829; Zoline on Fed. Crim. Law and Procedure, vol. 1, sec. 385, page 317); that the credibility of a defendant who has testified may be impeached in the same manner and to the same extent as any other witness, and no further (Raffel v. United States, 271 U. S. 494, 46 S. Ct. 566, 70 L. Ed. 1054; Fitzpatrick v. United States, 178 U. S. 304, 315, 20 S. Ct. 944, 44 L. Ed. 1078; Reagan v. United States, 157 U. S. 301, 305, 15 S. Ct. 610, 39 L. Ed. 709; Madden v. United States (C. C. A. 9), 20 F. (2d) 289; Tucker v. United States (C. C. A. 8), 5 F. (2d) 818); questions asked on cross-examination for the purposes of impeachment should be confined to acts or conduct which reflect upon his integrity or truthfulness, or so 'pertain to his personal turpitude, such as to indicate such moral depravity or degeneracy on his part as would likely render him insensible to the obligations of an oath to speak the truth.'"

In *Gideon v. United States,* 52 Fed. (2d) 427, the defendant, who was the mayor of a town, was convicted

of conspiracy to violate the National Prohibition Act. The prosecutor was permitted to cross-examine the defendant respecting defendant's appointing of improper persons as policemen. The cross-examination was permitted on the theory that it went to the credibility of the witness, but none of the matters had been gone into on the examination-in-chief of defendant. Some of them had occurred outside the period of the alleged conspiracy and had no bearing thereon.

In reversing the conviction, the court said:

> "We think too great latitude was allowed in this cross-examination of defendant. It is not permissible under the guise of testing the credibility of a defendant to question him on cross-examination about matters not touched upon in the examination-in-chief nor pertinent thereto; not tending to prove the charge upon which the defendant is being tried, but the sole tendency of which is to prejudice the defendant in the eyes of the jury. * * * We are led to the conclusion that whatever may have been the purpose of the cross-examination referred to, the effect was highly prejudicial to defendant. It had no tendency to prove the charge against him, but was calculated simply to degrade him in the eyes of the jury.
>
> In Allen v. United States (C. C. A.), 115 F. 3, page 11, the court said: 'What was the object of these improper questions? What was the motive? Was it not for the purpose of degrading the defendant before the jury? Such was evidently the effect, whether so intended or not. * * * Such an examination was irrelevant, unjust, unfair, and clearly prejudicial. * * * It was for the pur-

pose of showing that his habits were bad, * * * and to endeavor to secure his conviction upon general principles, independent of the testimony offered as to his guilt or innocence, weak or strong as it might be.'

Later on in the same opinion the court approvingly quoted from State v. Papage, 57 N. H. 245, 289, 24 Am. Rep. 69, the following language: 'It is quite inconsistent with that fairness of trial to which every man is entitled that the jury should be prejudiced against him by any evidence except what relates to the issue; above all, should it not be permitted to blacken his character, to show that he is worthless.' See, also, Paquin v. United States, 251 F. 579 (C. C. A. 8); Manning v. United States, 287 F. 800, 805 (C. C. A. 8); Newman v. United States (C. C. A.), 289 F. 712; Havener v. United States, *supra.*"

The attention of the court is respectfully invited to the fact that, in the above decision, the court quotes approvingly from the *Allen* case, *supra,* which was decided by this court.

In *Weiner v. United States,* 20 Fed. (2) 522, the court said:

"Some United States Attorneys, when prosecuting for violations of the National Prohibition Act (Comp. St., sec. 10138¼ *et seq.*), show a disposition to depart as far as they safely can from the rule which limits cross-examination of the defendant as to prior criminal convictions solely to an attack upon his credibility as a witness (when, as in this case, he has not put his character in issue) and to endeavor thus to lodge in the minds of jurors the

thought that, as the defendant has confessed a previous conviction for the commission of a similar crime, it is likely he committed the one for which he is on trial.

The law has long been settled that evidence of the commission of one crime cannot be used to prove the defendant committed another. (Wigmore on Evidence, sec. 192; Regina v. Oddy, 2 Denison Ct. C. 264; Boyd v. United States, 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077; Taliaferro v. United States (C. C. A.), 213 F. 25; Dyar v. United States (C. C. A.), 186 F. 514.) To this rule there are exceptions, for instance, when two offenses are inseparably connected and evidence of the first tends directly to prove the second. (Astwood v. United States, 1 F. (2d) (C. C. A. 8th) 639, 642.) The rule against the admissibility of evidence of one crime to prove another is equally applicable whether the evidence is elicited from witnesses for the prosecution or from the defendant himself. But when the defendant takes the stand in his own defense, he offers himself as a witness and, like all witnesses, submits himself to attack as to his credibility. For this purpose alone he may be asked, and be compelled to answer, questions as to the fact of previous convictions. And in this way his testimony may lawfully be weakened. It is just here that trouble arises, for not infrequently a prosecuting attorney will, if allowed, proceed further and explore the defendant's record in an endeavor to compare the facts of two unrelated cases and prove the one on trial by the one confessed. This, we have repeatedly held, is wrong. (Beyer v. United States (C. C. A.), 282 F. 225, 227; Mansbach v. United States (C. C. A.), 11 F. (2d) 221, 224.)"

See, also:

DeSoto Motor Corp. v. Stewart, 62 Fed. 914, 917;

Weil v. United States, 2 Fed. (2d) 145.

In *People v. Mohr,* 157 Cal. 732, the court said:

> "It is elementary that a defendant on trial for a specific offense may not be discredited in the minds of the jury by evidence of specific acts in his past life not connected in any way with the matter under investigation, either offered in chief by the district attorney, or elicited on cross-examination of the defendant, unless the evidence given by him on direct examination was of such a nature as to warrant it as proper cross-examination."

The unlimited cross-examination of the witness, Arko, was clearly prejudicial, not only to himself, but to the appellant, Panzich. The question as to whether a cafe operated by Panzich and in which Arko had been employed, in a different city and at a different time, had been padlocked by the Federal officers, had no tendency to prove or disprove any of the issues in this case, was clearly prejudicial and could have been asked only for the purpose of prejudicing both appellants in the minds of the jury. As was said in the *Beyer* case, *supra,* evidence that the appellants committed other crimes, at other times, may not be admitted to show that they had it within their power and were likely to commit the particular crime with which they were charged. It is easy to see how such evidence might prejudice the jury, render a fair trial impossible, and lead to a conviction.

In this case the attention of the court is respectfully invited to the fact that Arko was called as a witness on behalf of all defendants and that, consequently, the improper and prejudicial cross-examination of him prejudiced the appellant, Panzich, as much as it did the appellant, Arko.

For the foregoing reasons the appellants contend that the judgments and sentences should be reversed.

Respectfully submitted,

RUSSELL GRAHAM,
Attorney for Appellants.

APPENDIX.

JOHN ARKOVICH,

a witness on behalf of the defendants, testified as follows:
By Mr. Graham:

My name is John Arkovich. Some people call me Kelly for nickname. My nickname is Kelly. People call me Arkovich most of the times, but some people call me Kelly. I never told anyone my name was Kelly. My business is waiter. In April and May, 1931, I was employed in Ocean Park at Tony's Goodfellows Inn. I was head waiter. I started work there at the time the place was opened. I don't exactly remember the date. It was about the 17th or 18th of August, 1930. Tony Panzich hired me to work. He was the proprietor of the cafe. My duties as head waiter was to seat the people as they came in the place.

Examination

By the Court:

My duties were to seat them. That is all I did. I didn't wait on them. I was just the head waiter, to seat people at the tables. I was not a steward. I was head waiter. Just seated the people, that is all I did there. When the customers came in looking for a table I seated them. That is all I did. Just showed people that came in to eat to the place where they could sit down. That is all I did.

Further Direct Examination.

By Mr. Graham:

I didn't wait on any of the tables at all. I am acquainted with the defendant Nick Jurash. I first met

him on the night of the 14th. I first met him at Santa Monica in the cafe. His cousin came down there with him and went over to Mr. Panzich and asked him if he could give him a job and he went to work on May 15th, the day of the arrest. He had never worked in that cafe before that. I am acquainted with Tony Govarko. He never worked in that cafe. I saw him there one time May 15th, the day of the arrest. I saw these prohibition agents who testified here yesterday. Mr. Brooks and Mr. Casey. I never sold any of those men any whiskey and I never served them with any whiskey. I don't remember seeing them in the cafe, maybe I did, I don't remember. To my knowledge, the only time I seen them was when I was placed under arrest. I don't remember that they were in the cafe before that. When people came into the cafe it was part of my duty to seat them. I seated a great many people while I was in the cafe. Sometimes four or five hundred. Every day it wasn't the same thing. These people might have been in the cafe, but I don't remember them.

Cross-Examination.

By Mr. Rowell:

I did not have more of a responsible position there than head waiter. I wasn't Mr. Panzich's partner. I did not put up part of the security for the lease. My name is John Arkovich. I am the same John Arkovich whose name is mentioned in the grant deed given to the Elks Club as security for the lease. Tony Panzich put up his own security for the lease. I am the same John Arkovich mentioned in that deed. This is a deed to me and Tony Panzich and John Panzich from the Title Guarantee and Trust Company to certain property

in the county of Los Angeles, land. Two different pieces of land, the easterly 25 feet of Lot 1 and the other is the easterly 25 feet of Lot 2, 50 feet altogether. Tony Panzich, John Panzich and I bought this land together six years ago. (In response to the question: "You and Tony Panzich were working together in another restaurant at that time, weren't you, or operating another restaurant?" the witness replied: "I was never in partnership with Tony.") I was working for him, but not as a partner. When he came to make the lease to the Elks Club building at Santa Monica, I didn't know that he was going to move down there before he made that lease. He didn't talk to me about moving to Santa Monica until he moved down there. Before he went down to Santa Monica his restaurant was on First street.

Q. Where was his restaurant before he went down to Santa Monica? A. On First street.

Q. Well, that place was closed before you moved to Santa Monica? A. I don't remember if it was or not.

Q. Well, you remember when it was padlocked?

Mr. Graham: Now, just a minute. I object to that, and assign the question as misconduct and error.

The Court: You can object all you want—

Mr. Graham: I will.

The Court: Now, Mr. Graham, don't go very much further.

Mr. Graham: I beg your pardon.

The Court: This is a legitimate inquiry made at the request of the court, as you well know, and under circumstances justifying a thorough ventilation of the actions of this witness with a scheme which are, to say the

least, a little bit suspicious at the present time, and it will go to the utmost.

Mr. Graham: I have no objection to the inquiry being pursued, but I made my assignment.

The Court: You have made your objection to it?

Mr. Graham: Yes.

The Court: The court is ready to rule.

Mr. Graham: I also wish to ask the court to instruct the jury to disregard the question.

The Court: Well, your request is denied. Overruled. Go on.

Mr. Graham: Exception.

The Court: Go on.

Mr. Rowell: Q. Do you remember when the padlock was placed on that place on First street? A. I don't remember the date.

Q. You remember that it happened, however? A. I don't remember to my knowledge.

Q. You were working for Tony Panzich at the time it was padlocked, weren't you? A. I was working for him. I don't know, when was it padlocked?

The Court: Do you say you don't know whether—

The Witness: When was it padlocked?

The Court: Q. You say you don't know whether it was padlocked or not. Is that correct? A. I don't remember when.

Q. You don't remember when what? A. I don't remember when he was out of the place on First street.

Q. Do you remember or don't you remember whether the place ran by Tony Panzich was padlocked? A. The place it was closed. I don't remember if it was padlocked or not.

Q. Well, it was closed by the Government officers, wasn't it? A. I don't remember.

Q. You don't know if it was closed by the Government officers or not? A. No.

Mr. Rowell: Q. You were working there at the time it was done? A. I was working before.

Q. And you knew that they had started proceedings to try and close it up? A. I knew the place was closed, but I didn't know who closed it.

Q. Don't you remember testifying here in the proceedings to try and close it up? A. No.

Q. Weren't you here with Tony Panzich on that day? A. No, sir, I was not.

Q. How long have you been with Mr. Panzich? A. Oh, I have been with him more than 10 years.

Q. Where did he have a restaurant when you first went to work for him? A. On First street.

Q. Were you ever in the Summit avenue place? A. Yes, I was down there to his house once in a while.

Q. Well, he had a restaurant there on Summit avenue, didn't he? A. No, he didn't.

Q. Did you move from the First street place directly to Santa Monica? A. Tony moved down there and opened the place and gave me a job.

Q. Well, you remember when they quit business on First street, don't you? A. Yes.

Q. And you remember when you opened the place in Santa Monica? I don't mean the exact date. I mean about the time you opened the place down there? A. I didn't open it myself.

Q. You know when the place was opened at Santa Monica, don't you? A. Yes.

Q. All right, and you remember when the place was closed on First street, when you quit work on First street? A. I don't remember the date.

Q. You don't remember the date, but you remember you did quit work there?

Mr. Graham: I object on the ground that it is not proper cross-examination.

The Court: Overruled.

Mr. Graham: Exception.

The Court: Mr. Reporter, read that question.

(Question read.)

A. I don't remember when that place was closed.

Q. By Mr. Rowell: You know that it was closed, don't you? A. Yes.

Q. And you quit work down there? A. Yes.

I also went to work down at Santa Monica. I imagine it was about three months between the time I quit work on First street and the time I started working at Santa Monica. I am not positively sure. During that three months I was not working for Tony. I did not see him very many times during that time. I was not with him when he wrote that lease up with the Elks lodge on this place at Santa Monica. He said: "I am going to assign my share of the lease" for the place down at Santa Monica. Panzich told me, "I am figuring to open a restraurant," and asked me if I wanted to work for him.

Q. When he asked you if you wanted to work for him down there didn't he tell you he was going to put this land you had a third interest in for security? A. Yes, to assign his share of the lease.

Q. Did you not assign your share? A. I did not.

Q. Have you any interest in this land now? A. Yes.

Q. And have you any papers to show your interest was not included in this paper or deed that was given to them.

Mr. Graham: Objected to, not proper cross-examination.

The Court: Overruled.

Mr. Graham: Exception, and objected to on the further ground it assumes facts not in evidence; no evidence of the interest of anyone in that property.

The Court: Overruled.

Mr. Graham: Exception.

Mr. Rowell: Q. Did you ever get a statement from the Elks Club that they weren't holding your portion of this property as security for the lease? A. No, sir.

Mr. Graham: Same objection.

The Court: Overruled.

Mr. Graham: Exception.

Tony Govarko was not in that restraurant on the 30th of April, 1931, employed as a waiter. He was not there on April 30th. I know that. He was not there on May 4th. I know that. I am sure he was not there on the 13th of May, 1931. I am sure of that. I don't remember those dates, but I never seen him there but one time and that was on May 15th. He was there about 4:30 or 5:00 o'clock when I first seen him. I went to work at two o'clock in the afternoon. He wasn't there until 4:30 or 5:00 o'clock. He came in about 4:30 or 5:00 o'clock. I saw him come in, but he didn't come in with anybody. Nick Jurash was not there on the 30th of April, 1931. I am sure of that. I am sure he

was not there on May 4th. He was not there on May 13th, 1931. The first time Nick Jurash was ever there was on the 14th of May. The only conversation I ever had with Mr. Brooks was when he placed me under arrest. He asked me what my name was. I didn't see him there on the 30th of April, on the 4th of May or the 13th of May. I am sure of that. It is not a fact that on the 30th of April, 1931, in the evening that I delivered to Mr. Brooks one pint of whiskey (Government's Exhibit 1 in this case.) It is not a fact that I delivered to Agent Brooks and Agent Casey a pint of whiskey on the 4th of May, 1931. It is not a fact that I served to Agent Brooks and Agent Casey while they were eating their dinner on the night of May 13, 1931, a bottle of wine. It is not a fact that I delivered to them another pint of whiskey on that same day.

Redirect Examination.

By Mr. Graham:

I did not sign any documents relating to the lease that Mr. Panzich had on that cafe. [Tr. pp. 65-73, inc.]

No. 6998.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Tony Panzich and John Arko,
Appellants,

vs.

The United States of America,
Appellee.

APPELLEE'S REPLY BRIEF.

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TABLE OF AUTHORITIES CITED.

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APPELLEE'S REPLY BRIEF.

I.

The Court Did Not Err in Denying the Motion of the Defendants for an Instructed Verdict of Not Guilty.

The first assignment of error relied upon by the appellants herein is the denial by the court of their motion for an instructed verdict of not guilty, contending that the evidence was insufficient to support the verdict of guilty as to the appellants herein. (Appellants' Opening Brief, p. 12.)

The appellants concede that Tony Panzich was the proprietor of the cafe, and that on numerous bills or

statements in the cash register there were "B R K" items (Appellants' Opening Brief, p. 14), but insist that this is insufficient evidence of a conspiracy to violate the National Prohibition Act.

It is important to review briefly the evidence in order to show clearly the proper inferences that may be drawn from the above admissions.

The testimony of the first Government witness, S. W. Brooks [Transcript of Record, p. 21], shows that on April 30, 1931, he, with three companions, went to the Good Fellows Inn at Santa Monica; was introduced to Mr. Panzich just after entering, and was escorted to a booth by John Arko; ordered a pint of whiskey from John Arko at a price of $2.00 and received the whiskey; ordered dinner from another waiter, and when he was presented with his bill there appeared, in addition to the bill for food, the initials "B R K" and the sum $2.00—the price of the liquor. He testified that on May 4, 1931, he again went to the Good Fellows Inn in company with Federal Agent Casey, ordered whiskey from Arko, and dinner, and received a statement for food in the same manner with the food itemized at the top and the liquor itemized at the bottom as "B R K"; a charge of $2.00 was placed after the item "B R K". [Transcript of Record, p. 23.] He testified that on May 13, 1931, he returned to the Good Fellows Inn accompanied by Agent Casey, ordered a pint of liquor from a waiter whom he did not name, and a quart of wine from John Arko; that the statement again included the bill for food, the initials "B R K" and the sum of $2.00, the price of the whiskey, and an item of $2.50 for the wine; that on May 15th the

place was raided, and that he and Agent Clements entered some thirty minutes after the agents who had made the arrests, and that at that time he seized from Tony Panzich a number of statements that he had in his cash register, and that all of the statements contained "B R K" items. The bottles of liquor purchased were placed in evidence, as were the slips with the "B R K" items. (Government's Exhibit 4.)

It is admitted by the appellants that a conspiracy, as any other offense, may be proved by circumstantial evidence (Appellants' Opening Brief, p. 16), but it is contended that the testimony of the Prohibition Agents as to the purchase of liquor from certain waiters was just as consistent with the theory that these waiters were selling liquor without the knowledge or consent of the proprietor as with the theory that they were selling it with his knowledge or consent.

The jury certainly had a right to believe that Tony Panzich was the proprietor of the cafe, that the initials "B R K" referred to purchases of whiskey, and that slips bearing such initials were found in the cash register, and to draw the logical inference that the selling of whiskey was just as regular a part of the Inn's business as the selling of food, which was itemized on the same slips, and that being a regular part of the Inn's business and supplying a regular portion of the Inn's revenue was done with the knowledge of Tony Panzich, the proprietor, and done with deliberate intent.

II.

There Was No Prejudicial Error in the Court's Reading the Names of the Appellants Herein Separately, and Requiring Each to Stand in the Presence of the Witnesses for the Appellee.

The second contention of the appellants is that the court erred in requiring the defendants to stand in the presence of the plaintiff's witnesses over the objection of counsel for the appellants, which objection was on the grounds that the identification of the defendants by said plaintiff's witnesses might be a material point in the defense of the case. (Appellants' Opening Brief, p. 18.)

The appellants admit that they have been unable to find any authorities in support of the above alleged error, but maintain that the prejudice occasioned thereby is so apparent that the citation of authorities seems unnecessary. (Appellants' Opening Brief, p. 21.)

It is difficult to see how they can claim any prejudice as regards the two defendants who were convicted and are now appealing. They do not claim that there was any mistake as to Tony Panzich's being the proprietor of the cafe, nor as to John Arko's having been the head waiter; in fact, John Arko took the stand in his own behalf and testified that he was the head waiter and that his duties were to show patrons to their booths or tables. This is in accord with the testimony of Agents Brooks and Casey, the only conflicting testimony being not as to the identity of John Arko as head waiter, but as to whether he did or did not sell the liquor.

Appellants admit, as was pointed out heretofore, that Tony Panzich was the proprietor of the cafe, and he is

mentioned in the testimony of the Government witnesses only as having been in the cafe on April 30, 1931, at which time Agent Brooks was introduced to him, and on the night of the raid, May 15, 1931, at which time he was arrested, and as having leased the property from the Elks' Club at Santa Monica.

In view of these facts it would seem clear that whether or not it was error on the part of the court to compel the defendants to stand without excluding the witnesses against them, it was not prejudicial error as to the appellants herein.

III.

The Court Did Not Err in Permitting Counsel for the Plaintiff to Cross-Examine the Defendant, John Arko, With Reference to His Employment by the Defendant, Tony Panzich, at a Cafe on East First Street in Los Angeles, California, and With Reference to the Padlocking of Such Cafe by the United States Government.

In support of their contention that there was error in the cross-examination of John Arko, as indicated above, the appellants argued two propositions: (1) that the cross-examination was improper in that it went beyond the scope of the direct examination; and (2) that evidence of other crimes is not admissible to prove the crime charged in the indictment. (Appellants' Opening Brief, p. 22, and following.)

As to the second point, there was no evidence sought nor elicited of any prior crime on the part of either of the appellants. It is true that the question tended to show

that the restaurant on East First street had been padlocked by the Federal officers. Even though it be conceded for the purposes of argument that the inference was that it was abated as a nuisance under the National Prohibition laws, an abatement is a civil and not a criminal proceeding, and there were no questions asked nor testimony given as to the pleas, indictment, or conviction of either of the appellants in any criminal proceeding whatsoever, nor was there any testimony as to the sale or possession of liquor in the East First street restaurant with or without the knowledge of either of the appellants.

Furthermore, even accepting the interpretation placed upon this portion of the testimony by the appellants, the rule is well established that evidence which is relevant to the defendant's guilt is not rendered inadmissible because it proves or tends to prove him guilty of another and distant crime.

16 *Corpus Juris* 588;
Moore v. United States, 150 U. S. 57;
Tucker v. United States, 224 Fed. 833;
Lueders v. United States, 210 Fed. 419;
Jones v. United States, 179 Fed. 584;
Wolfson v. United States, 102 Fed. 134.

"Even though the commission of another offense is thereby shown, evidence of sales other than those charged, or at times not mentioned in the indictment or information, is admissible in a prosecution for keeping a 'blind tiger,' or for unlawfully keeping or running a house or place where intoxicating liquors are kept, stored, sold, or given away in violation of law; but evidence that defendant maintained a liquor

nuisance *some years before* is not admissible, it not being competent to prove other offenses under different circumstances to show that accused is a violator of law generally." (Italics ours.)

16 *Corpus Juris* 607, citing *People v. Bullock,* 173 Mich. 397.

In the instant case the testimony showed that but three months had elapsed between the association of John Arko with Tony Panzich at the East First street restaurant and his association with him at the Good Fellows Inn at Santa Monica.

"In a prosecution for engaging in or pursuing the occupation or business of selling intoxicating liquors in prohibition territory, evidence of sales other than those charged in the indictment is admissible to show that accused was engaged in or pursuing the occupation or business charged. . . . This is true not only as to sales made about the time named in the indictment but even as to sales made a considerable period of time before, where there is evidence showing a continuity of the business; . . ."

16 *Corpus Juris* 606, citing *Dickson v. State,* 66 Tex. Cr. 270, 146 S. W. 914.

"The instances are many in which evidence of the commission of other offenses is necessarily admissible. In *Parker v. United States,* 203 Fed. 950, 952, 122 C. C. A. 252, this court held that where evidence as to other offenses is clearly interwoven with the case on trial it is admissible. . . . And we understand the rule to be that, if intent or motive be one of the elements of the crime charged, evidence of other like

conduct by the defendant at or near the time charged is admissible."

Harris v. United States, 273 Fed. 785, at 791 (C. C. A. 2).

It has also been generally held that it is within the discretion of the court to reject or admit evidence of former acts or occurrences as proof that a particular act was done or a certain occurrence happened.

22 *Corpus Juris* 744;

Barnard v. Bates, 201 Mass. 234, 87 N. E. 472.

As to the contention that the cross-examination was improper as having gone beyond the scope of the direct examination, the rule laid down by the appellants herein would seem to be narrower than that warranted by the authorities.

The Supreme Court of the United States has held in *Wills v. Russel,* 100 U. S. 621, at 625, that:

> "Authorities of the highest character show that the established rule of practice in the Federal courts and in most other jurisdictions in this country is that a party has no right to cross-examine a witness, *without leave of the court,* as to any facts and circumstances not connected with matters stated in his direct examination, subject to two necessary exceptions. He may ask questions to show bias or prejudice in the witness, or to lay the foundation to admit evidence of prior contradictory statements." (Italics ours.)

The court goes on to say that

> "* * * it is equally well settled by the same authorities that the mode of conducting trials, and the

> order of introducing evidence, and the time when it is to be introduced, are matters properly belonging very largely to the practice of the court where the matters of fact are tried by a jury."

and further

> "* * * nor is attention called to any case where it is held that the judgment will be reversed because the court trying the issue of fact relaxed the rule and allowed the cross-examination to extend to other matters pertinent to the issue."

It is to be noted that the cross-examination objected to in the instant case was not only with the leave of the court, but at the request of the court.

> "The Court: This is a legitimate inquiry made at the request of the court, as you well know . . . ." [Transcript of Record, p. 68.]

This general rule that matters may be brought out in cross-examination which have not been referred to in direct examination, at the discretion of the court, is well stated in 40 *Cyc.* 2506:

> "The rule limiting the cross-examination to the scope of the direct is not absolute, but merely indicates the course which is considered the better practice, leaving the application of the rule in any particular case to the discretion of the trial court, which may depart from such practice and allow the cross-examination to go beyond the scope of the direct when it deems proper, and whose action will not be reviewed on appeal, unless an abuse of discretion is shown."

The case of *Allen v. United States,* 115 Fed. 3, at page 11, decided by this court and relied on by the appellants

herein, is in accord with the principles stated *supra,* and not in accord with the contentions of the appellants. The defendant in that case was indicted for robbery, and cross-examination was permitted as to his gambling and hanging around pool halls and saloons, and prior difficulties he had been in, which had no conceivable connection with the crime for which he was tried. This testimony was admitted for the purpose, as stated by the court (Opinion, p. 7), of showing the habits and character of the defendant prior to the time of the alleged offenses specified in the indictment, and the cross-examination pertaining to these matters covered some thirty pages of the printed record. This court, in reversing the decision of the lower court, said:

> "From the cross-examination of the defendant . . . . . it is apparent that the object of the prosecution was not solely for the purpose of bringing out facts that had any specific relation to the offense alleged against him. It was evidently not for the purpose of impeaching or discrediting him. . . . Of course, if the examination had been confined to these or like purposes, it would have been the duty of the court to have allowed great latitude in the cross-examination of this witness, and the questions allowed would have been largely within the reasonable discretion of the court."

The rule seems clear also that where the direct examination opens up a general subject, the cross-examination may go to any phase of that subject.

Clarke v. Clarke, 133 Cal. 667, 66 Pac. 1037;

Sharp v. Hoffman, 79 Cal. 404, 21 Pac. 846;

People v. Maughs, 8 Cal. App. 107, 96 Pac. 407.

Applying the above principles to the facts of the instant case, it is important to analyze the testimony as given in the direct examination of John Arko and that elicited in his cross-examination, and it is important to bear in mind that both of the appellants were charged with having unlawfully *conspired* to commit certain offenses against the United States by selling and possessing large quantities of intoxicating liquor. The charge being a conspiracy and not the substantive offenses of selling and possessing intoxicating liquor, the relation of the defendants to each other, both at the time charged in the indictment and immediately prior thereto, was clearly material.

On direct examination John Arko testified [Transcript of Record, p. 65], that he was employed at Tony's Good Fellows Inn as headwaiter, and that he started to work there when the place was opened; that he was hired by Tony Panzich, and that his duties were merely to seat people at the tables; that he had not sold the Prohibition Agents who testified any whiskey, and that he could not remember whether or not he had seen the Prohibition Agents who testified, prior to his arrest.

The Government's contention was that he was not a mere employee, but was in fact a partner of Tony Panzich in the enterprise. It was clearly material and proper cross-examination to ask any questions which would indicate the existence of a business arrangement between the two other than that of mere employer and employee. In support of this theory on the part of the prosecution, John Arko was questioned concerning a deed given to the Elks' Club as security for the lease, which deed was a deed to Tony Panzich, John Panzich, and John Arko from

the Title Guarantee and Trust Company to certain property in the county of Los Angeles. It is obvious that if he put up part of the security for the lease the logical inference could be drawn that he was a partner in the enterprise rather than an employee. He testified on cross-examination that he had not put up part of the security for the lease, although admitting that his name appeared on the deed. In that state of the evidence it would seem proper to permit examination as to the circumstances under which the deed was executed and the relationship of Tony Panzich and John Arko at that time. Accordingly, he admitted in reply to questions put by the attorney for the prosecution, that this land was bought by the grantees at a time when they were working together in another restaurant. It would seem to be within the discretion of the court to permit questions as to the relationship of the two at the time when the land was bought and up to the time the deed was given as security for the lease for the purpose of showing that in fact the two appellants were principals throughout. John Arko testified that at the time this property was bought he was working for Tony Panzich in the restaurant on East First street, and that he could not remember whether or not it was padlocked, nor if it was padlocked when it was padlocked, but that immediately after the place on East First street was closed, Tony Panzich moved down to Santa Monica, and as nearly as he could remember it about three months elapsed between the time he stopped working on First street and the time he started working at Santa Monica.

There are several theories under which this testimony was properly admissible, one being that it grew out of and tended to impeach his testimony on direct examination

that he was merely the head waiter and employee of Tony Panzich; and another being that this testimony showed a continuing enterprise, and that the fact of an involuntary closing of the restaurant on East First street was material as carrying with it an inference that there had been no alteration in the relationship between Tony Panzich and John Arko, but that to all intents and purposes the Good Fellows Inn at Santa Monica might be considered as one and the same enterprise as the restaurant on East First street.

While the fact that Tony Panzich, John Panzich, and John Arko bought property jointly at a time when they were associated in the restaurant business together would not of itself indicate that their relations at that time were any other than employer and employee, taken in conjunction with the fact that this deed was put up as security for the lease at Santa Monica it might be considered as of some import in determining the relationship between the two.

It is also the contention of the Government that the padlocking of the premises on East First street might have been introduced independently of any theory of partnership, to show knowledge and intent on the part of the appellants herein of the possession and sale of liquor at Santa Monica, by reason of the fact that there is a clear inference that the reason for establishing another restaurant than the one on East First street was the involuntary closing of that restaurant.

It is admitted that had several years elapsed between the closing of the first restaurant and the opening of the second, that the closing of the first could not be used as

evidence, but the principles stated *supra* and supported by authority support the admissibility of this evidence in view of the fact that the Santa Monica restaurant was opened almost immediately after the closing of the restaurant on First street.

If the evidence of the padlocking of the First street restaurant was admissible at all, independent of its bearing upon the direct examination of the defendant John Arko, the authorities indicate that it was within the discretion of the court to permit that matter to be brought out on cross-examination.

For these reasons, it is respectfully submitted that the decision of the District Court should be affirmed.

PEIRSON M. HALL,
United States Attorney,

DOROTHY LENROOT BROMBERG,
Assistant United States Attorney.

No. 7009

United States
Circuit Court of Appeals
For the Ninth Circuit

UNIVERSAL AUTOMOBILE INSURANCE COMPANY, a corporation,

Appellant

vs.

FRANK NOEL,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

PERNAU-WALSH PRINTING CO., 755 MARKET ST., SAN FRANCISCO

No. 7009

United States
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UNIVERSAL AUTOMOBILE INSURANCE COMPANY, a corporation,

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Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

SNIVELY & BOUNDS,
Ward Building, Yakima, Washington,
Attorneys for Appellant.

D. V. MORTHLAND,
Miller Building, Yakima, Washington,
Attorney for Appellee.

In the Superior Court of the State of Washington in and for Yakima County.

No. 25,131

State of Washington,
County of Yakima.—ss.

FRANK NOEL,

Plaintiff,

vs.

UNIVERSAL AUTOMOBILE INSURANCE COMPANY, a stock corporation,

Defendant.

SUMMONS.

The State of Washington to the said Universal Automobile Insurance Company, a stock corporation. Defendant:

You are hereby summoned and required to be and appear within twenty (20) days after the ser-

vice of this Summons upon you, exclusive of the day of service if served within the State of Washington, or within sixty (60) days after service of this summons upon you, exclusive of the day of service, if served out of the State of Washington, and answer the complaint and serve a copy of your answer upon the undersigned attorney at the place below specified and defend the above entitled action in the Court aforesaid; and in case of your failure so to do judgment will be rendered against you, according to the demand of the complaint, a copy of which is herewith served upon you (or which will be filed with the Clerk of said Court within five (5) days after service of this Summons upon you).

SNIVELY & BOUNDS,
Attorneys for Plaintiff.

Office and Postoffice Address:
Ward Building,
101½ E. Yakima Ave.,
Yakima, Washington. [1]*

*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the Superior Court of the State of Washington in and for Yakima County.

No. 25,131

FRANK NOEL,

Plaintiff,

vs.

UNIVERSAL AUTOMOBILE INSURANCE COMPANY, a stock corporation,

Defendant.

COMPLAINT.

The plaintiff complains of the defendant and alleges:

1.

That the defendant company designates itself and is known as the Universal Automobile Insurance Company, and is further designated and known as a stock corporation, with its principal office in Dallas, Texas; and at all times mentioned in this complaint, the defendant was authorized to and is doing business in the State of Washington.

2.

That on June 1, 1931, the defendant company issued to one John Noel, its three certain insurance policies, being known as policies number A. X. 463254; number A. X. 463255; number A. X. 463256, respectively. Said policies so issued, insured three trucks of the said Noel for the principal sum of $4000.00, respectively, said trucks

being what is known as White five ton trucks, respectively. The terms and conditions of said policies are more fully set out in the said respective policies which are marked plaintiff's Exhibits "A", "B" and "C", respectively.

3.

That on or about the 26th day of June, 1931, each of the said three trucks described and covered by the said three policies, respectively, while the said trucks were stopped on what is known as the North Fork of the John-Day Highway, and sometimes known as the John-Day Grade, Umatilla [2] County, Oregon, and at a point on said grade or highway that was very steep, got out of control and went over the bank and upset and rolled to the bottom which was considerable distance, therein and thereby completely wrecking and rendering the said trucks and each of them useless and valueless, to the damage of the assured and now of the assured's assignee in the principal sum under each of the policies of $4000.00, to wit: $12000.00, total sum under the three policies, for the loss of the said three trucks.

4.

That the assured, John Noel, timely and in compliance with the said policies, gave notice to the defendant company and to its agents, of the said loss, and that said defendant company acting through its duly authorized agents, on or about the

12th day of August, 1931, denied liability under the said policies and each of them.

5.

That on the 9th day of September, 1931, the assured, John Noel, in writing, duly and regularly assigned all of his right title and interest in and to the said three policies and in and to any recovery of the same to one Frank Noel, and that the said Frank Noel is now and has been, since the 9th day of September, 1931, the beneficiary under each of the said three policies. That said written assignment is marked, plaintiff's Exhibit "D".

WHEREFORE, plaintiff prays that he have judgment against the defendant for the sum of $12000.00, being the total limit of liability under the three policies, respectively, and for interest on said sum from the 26th day of June, 1931 together with his costs and disbursements incurred in the preparation and trial of this action.

SNIVELY & BOUNDS,
Attorneys for Plaintiff. [3]

VERIFICATION.

State of Washington,
County of Yakima.—ss.

This day personally appeared before me, the undersigned, Notary Public in and for said County and State Frank Noel, who, having first being duly

sworn by me, upon oath deposes and says: That he is the plaintiff named in the foregoing Summons and Complaint, that he has heard the same read over, knows the contents thereof and that the same are true as he verily believes.

FRANK NOEL.

Subscribed and sworn to before me this 10th day of September, A. D. 1931.

[Seal] I. J. BOUNDS,

Notary Public in and for the State of Washington, residing at Yakima, Washington.

Service accepted and copy received of the within this ..... day of ..... 193...

.....,

Attorney for.....

[Endorsed]: Filed Sept. 10, 1931. Thomas Granger, County Clerk. [4]

[Title of Court and Cause.]

PETITION FOR REMOVAL TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

Comes now the defendant and appearing specially in the above entitled action, files this, its petition for removal of the above cause to the United States District Court for the Eastern District of Washington, Southern Division, and on that behalf alleges:

1.

That the defendant, Universal Automobile Insurance Company, is a corporation organized under the laws of Texas, with its principal office and place of business at Dallas, Texas; that it is a citizen of the State of Texas, but is authorized to transact an insurance business in the State of Washington.

2.

That the plaintiff, Frank Noel, is a resident and citizen of Yakima County, Washington, the same being within the jurisdiction of the United States District Court for the Eastern District of Washington, Southern Division. That he has duly commenced in the above entitled Superior Court an action against the defendant.

3.

That there exists between the parties to the above suit a controversy involving more than $3,000.00, to wit, [5] as shown by the complaint in said action the said controversy involves the sum of $12,000.00, and that defendant has a meritorious defense thereto.

4.

That the diversity in the citizenship between the plaintiff and defendant corporation existed at the time of the commencement of the above entitled action and still exists and that the controversy above

mentioned involved more than $3,000.00 at the time of the commencement of said action and still involves more than said sum as hereinbefore stated.

5.

That notice of the filing of this petition for removal of said cause to the United States District Court as aforesaid has been duly given in the manner provided by law.

6.

That a bond conditioned as provided by law, has been filed with this petition.

WHEREFORE, petitioner prays that the Court make and enter an order herein removing the said cause from the Superior Court of Yakima County, Washington, to the United States District Court for the Eastern District of Washington, Southern Division, and that the clerk of the above entitled Court be ordered to transfer all of the files and proceedings in said action to the clerk of the United States District Court for the Eastern District of Washington, Southern Division, at Yakima, Washington, and that the Court enter such other and further orders herein as shall be necessary and proper to effect the said removal.

D. V. MORTHLAND,
Attorney for Defendant. [6]

State of Washington,
County of Yakima.—ss.

D. V. Morthland, being first duly sworn, on oath deposes and says:

That he is the attorney of record for the defendant above named; that he is authorized to make application for the removal of the above entitled cause to the United States District Court for the Eastern District of Washington, Southern Division, and is authorized to verify the foregoing petition; that he has read over the foregoing petition, knows the contents thereof and that same are true to the best of his knowledge and belief.

D. V. MORTHLAND.

Subscribed and sworn to before me this 28th day of September, 1931.

[Seal] MILDRED DIXON,
Notary Public for Washington residing at Yakima, Washington.

[Endorsed]: Filed Sept. 28, 1931. Thomas Granger, County Clerk. [7]

BOND FOR REMOVAL. #25131

KNOW ALL MEN BY THESE PRESENTS, That the CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a corporation under the laws of the State of New York, having an office and principal place of business at No. 475 Fifth Avenue, Borough of Manhattan, in the City of New York and State of New York, is held and firmly bound unto FRANK NOEL in the penal sum of five hundred ($500) dollars, for the payment whereof well and truly to be made unto the said FRANK NOEL, heirs, executors, administrators, successors and assigns, the said CONSOLIDATED INDEMNITY AND INSURANCE COMPANY binds itself, its successors and assigns, firmly by these presents.

UPON THESE CONDITIONS: the said UNIVERSAL AUTOMOBILE INSURANCE COMPANY, a stock corporation being about to petition the Superior Court of the State of Washington, held in and for the County of Yakima for the removal of a certain cause therein pending, wherein the said FRANK NOEL plaintiff and the said UNIVERSAL AUTOMOBILE INSURANCE COMPANY, a stock corporation defendant, to the District Court of the United States, for the Eastern District of Washington.

Now, if the said UNIVERSAL AUTOMOBILE INSURANCE COMPANY, a stock corporation shall enter in such District Court of the United

States, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and shall well and truly pay all costs that may be awarded by the said District Court of the United States if said District Court shall hold that such suit was wrongfully or improperly removed thereto, and also shall appear and enter special bail in such suit if special bail was originally requisite therein, then this obligation to be void, otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, the said CONSOLIDATED INDEMNITY [8] AND INSURANCE COMPANY has caused its corporate seal to be hereto affixed, and these presents to be signed by its duly authorized officers, on the 26th day of September, 1931.

[Seal] CONSOLIDATED INDEMNITY
AND INSURANCE COMPANY,
By ROBERT E. TENNEY,
Attorney in Fact.

Attest:
KAY G. SEIBIRD.

[Endorsed]: Filed Sept. 28, 1931. Thomas Granger, County Clerk. [8½]

[Title of Court and Cause.]

NOTICE.

To the above named plaintiff, Frank Noel and to Snively & Bounds, his attorneys:

You, and each of you, will please take notice that the above named defendant has caused to be filed in the above Court a petition for the removal of said cause to the United States District Court for the Eastern District of Washington, Southern Division, and that same will be presented to one of the Judges of the above Court, together with the bond as provided by law, on Thursday, the 1st day of October, 1931, at the hour of 1:30 o'clock P. M. or as soon thereafter as counsel may be heard.

Dated at Yakima, Washington, this 28th day of September, 1931.

D. V. MORTHLAND,
Attorney for Defendant.

Service of the within and foregoing notice, together with a copy of the Petition for removal of the cause and copy of bond received this 28th day of September, 1931.

SNIVELY & BOUNDS,
Attorneys for Plaintiff.

[Endorsed]: Filed September 28, 1931. Thomas Granger, County Clerk. [9]

[Title of Court and Cause.]

ORDER FOR REMOVAL TO THE UNITED STATES DISTRICT COURT.

The above entitled cause coming on regularly before the Court upon the petition of the defendant for an order removing the said cause from the Superior Court of the State of Washington, in and for Yakima County, to the United States District Court for the Eastern District of Washington, Southern Division, and it appearing to the Court that a diversity of citizenship exists between the parties to said action; that the amount in controversy is more than $3,000.00, and that the defendant has duly filed its petition for such removal and therewith a bond as provided by the statutes of the United States in such cases, and that said defendant is entitled to the removal of said cause to the said United States Court, the said bond being conditioned upon such removal within the period of thirty days after the date hereof, and the Court being fully advised in the premises, notice of said petition and bond having been duly given,

IT IS NOW HEREBY ORDERED AND ADJUDGED that the above entitled cause be, and the same hereby is removed to the United States District Court, for the Eastern District of Washington, Southern Division, and that the Clerk of this Court properly prepare the files and proceedings hereof [10] and cause same to be filed in the office of the Clerk of said United States District Court,

for the Eastern District of Washington, Southern Division, at the cost and expense of said defendant.

DONE IN OPEN COURT this 1st day of October, 1931.

DOLPH BARNETT,
Judge.

[Endorsed]: Filed for record, Oct. 1, 1931, and recorded in Vol. 34 of Sup. C. J. page 217. Thomas Granger, County Clerk. [11]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

FRANK NOEL,
Plaintiff,

vs.

UNIVERSAL AUTOMOBILE INSURANCE COMPANY, a stock corporation,
Defendant.

NOTICE OF REMOVAL TO FEDERAL COURT.

To the above named plaintiff, Frank Noel, and to Snively & Bounds, his attorneys:

You, and each of you, will please take notice that pursuant to an order of the Superior Court in and for Yakima County, Washington, entered October 1st, 1931, the files in the action entitled: "In the Superior Court of the State of Washington, in and

for Yakima County, Frank Noel, Plaintiff, v. Universal Automobile Insurance Company, a stock corporation, Defendant," have been transferred to and filed in the office of the Clerk of the United States District Court for the Eastern District of Washington, Southern Division, at Yakima, Washington.

Dated at Yakima, Washington, this 21st day of October, 1931.

D. V. MORTHLAND,
Attorney for Defendant.

Service accepted and copy received this 22nd day of October, 1931.

SNIVELY & BOUNDS,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 23, 1931. W. S. Coey, Clerk. [12]

[Title of Court and Cause.]

AMENDED ANSWER.

Leave of Court therefor having been first obtained, the defendant in the above entitled action hereby files its amended answer, and in that behalf admits, denies and alleges:

1.

Admits the allegations contained in paragraphs 1 and 2 of plaintiff's complaint.

2.

Denies each and every allegation, matter and thing contained in paragraphs 3 and 4 of said complaint, except as same or any thereof may be hereinafter alleged, admitted or explained.

3.

For want of information upon which to form a belief the defendant denies the allegations contained in paragraph 5 of said complaint.

Further answering said complaint and by way of a first affirmative defense thereto, the defendant alleges:

1.

That on or about June 1st, 1931, through its office in Spokane, Washington, upon the application of John Noel, and [13] upon representations made to the defendant by said John Noel, and/or his duly authorized agent or agents as hereinafter more fully set forth, the defendant issued in the name of said John Noel, the three policies of indemnity insurance described in plaintiff's complaint, attached thereto and marked Exhibits A, B, and C therein.

That a material stipulation of the insurance contracts evidenced by each of said policies is contained in paragraph 2 under statement of conditions and agreements "F" as follows:

> "F." Unless otherwise provided by agreement in writing added hereto, the Company shall not be liable; * * *

(2) Under Section 2 nor under Item 4 of Section 1 of the Schedule of Perils, for any loss, damage, or expense while the automobile insured hereunder is operated, maintained, or used * * * (c) for towing or propelling any trailer or vehicle (incidental assistance to a stranded automobile on the road is permitted)."

That no agreement, either oral or in writing, permitting the towing and/or propelling of any trailer or vehicle by said trucks or either of them was ever made, added to and/or attached to the said policies or either thereof.

3.

That said John Noel, the assured named in said policies, on or about June 26th, 1931, was operating the trucks described in said policies upon a certain road in Umatilla County, Oregon, known as the North Fork of the John Day Highway. That said road at the place hereinafter mentioned was on a steep grade and that in operating said trucks the said John Noel caused each and all thereof to be fastened together by cables or chains and the said trucks so fastened, chained or cabled together were in turn chained or fastened by cable to another vehicle then being towed by the said trucks along the said highway and upon the said grade, to-wit, a [14] steam shovel; that is to say, the first or lead truck was engaged in towing the other two trucks and the steam shovel, and each of the other

trucks in turn was towing the truck behind it and the said steam shovel.

4.

That while said assured was so engaged in towing the said trucks and steam shovel, the said trucks for some cause and in some manner unknown to the defendant, and while so chained or fastened together, went over the outside of said road and over the edge thereof, and that all of said trucks, together with said steam shovel being so towed, rolled down the hill or grade off and below the said highway and were damaged. That the effective cause of said damage was the towing of said trucks and steam shovel contrary to the terms and conditions of said insurance contracts and not otherwise.

That for a second affirmative defense the defendant alleges:

1.

The defendants incorporate herein by this reference each, every and all of the allegations contained in its first affirmative defense.

2.

That in said policy of insurance numbered AX 463254, statement 11 thereof is as follows:

> "Statement 11. The automobile described herein is paid for in full and is not mortgaged, except in the amount of $740.00, which

is payable in monthly installments, subject to the terms, conditions, limitations and agreements of this policy, if any, under section 1 of the Schedule of Perils is made payable to Auto Loan Company of Yakima, Wash., as their interest may appear."

3.

That the above statement was made by said John Noel to the defendant as an inducement for the issuance of said insurance policy and said statement written into said policy [15] being the representation made by him to the defendant upon inquiry by the defendant as to the conditions of the title to said property insured as to whether or not same was mortgaged.

4.

That in truth and in fact the truck described in said policy, to-wit, a 1928 White 5 ton truck, S.#138992, M.#5687, was not only mortgaged to the Yakima Auto Loan Company for the sum of $740.00, but at the time of the issuance of said policy was also mortgaged by chattel mortgage to Frank Noel for the sum of $8056.94, the said mortgage being dated January 3rd, 1929, and filed in the office of the County Auditor of Yakima County, Washington, on January 3rd, 1929, and being in force and unreleased and unsatisfied in the office of the County Auditor of Yakima County, Washington, from the date of the filing thereof, to-wit,

January 3rd, 1929, until after the damage to said truck hereinbefore described, which occurred on June 26th, 1931, and that said mortgage was also recorded on September 11th, 1929, at page 86 of Book 58, Records of Chattel Mortgages of Umatilla County, Oregon, and remained unreleased and unsatisfied on the records of said Umatilla County, Oregon, at all times from the date of recording thereof until after the damage which resulted to said truck on June 26th, 1931.

5.

That the truth of said statement 11 so made in the application of said John Noel for the policy issued thereon, was material to the issuance of said policy and without which the said policy would not have been issued, and that if the said John Noel had disclosed to the defendant the fact that the said property was also mortgaged to Frank Noel in the sum hereinbefore set forth or at all, the said policy would not [16] have been issued to said assured, and that by reason of said misrepresentation on the part of said John Noel as to the condition of the title to said property, the defendant was deceived and was thereby fraudulently induced to issue said policy under conditions which affected the moral hazard thereof. That the defendant is advised and believes, and therefore alleges the fact to be that said John Noel made the false representation as to the condition of the title to said property with the intention to deceive the

defendant and to mislead it in the issuance of said policy of insurance AX #463254. That by the acceptance of said policy with said statement 11 contained therein as hereinbefore set forth said John Noel ratified and confirmed the said false representations so made by him or in his behalf in applying for said policy.

By way of a third affirmative defense to the plaintiff's complaint, the defendant alleges:

1.

The defendant incorporates herein by this reference all of the allegations, matters and things contained in its first affirmative defense.

2.

That in said policy of insurance AX #463255, statement 11 thereof is as follows:

> "Statement 11. The automobile described herein is paid for in full and is not mortgaged, except in the amount of (no exceptions), which is payable....., subject to the terms, conditions, limitations and agreements of this policy, if any, under section 1 of the Schedule of Perils is made payable to.....as..... interest may appear."

3.

That the above statement was made in the application by said John Noel for the issuance of said insurance policy and was a representation made by

him to the defendant upon [17] inquiry by the defendant as to the conditions of the title to said property insured as to whether or not same was mortgaged.

4.

That in truth and in fact the truck described in said policy, to-wit, a 1928 White 5 ton truck, S.#144846, M#9381, was mortgaged by chattel mortgage to Frank Noel for the sum of $8056.94, the said mortgage being dated January 3rd, 1929, and filed in the office of the County Auditor of Yakima County, Washington, on January 3rd, 1929, and being in full force and unreleased and unsatisfied in the office of the County Auditor of Yakima County, Washington, from the date of the filing thereof, to-wit, January 3rd, 1929, until after the damage to said truck hereinbefore described, which occurred on June 26th, 1931, and that said mortgage was also recorded on September 11th, 1929, at page 86 of Book 58, Records of Chattel Mortgages of Umatilla County, Oregon, and remained unreleased and unsatisfied on the records of said Umatilla County, Oregon, at all times from the date of recording thereof until after the damage which resulted to said truck on June 26th, 1931.

5.

That the truth of said statement 11 so made in the application of said John Noel for the policy issued thereon, was material to the issuance of said

policy and without which said policy would not have been issued, and that if the said John Noel had disclosed to the defendant the fact that said property was mortgaged to Frank Noel in the sum hereinbefore set forth or at all, the said policy would not have been issued to said assured, and that by reason of said misrepresentations on the part of said John Noel as to the conditions of the title to said property, the defendant was deceived and was thereby fraudulently induced to issue said [18] policy under conditions which affected the moral hazard thereof. That the defendant is advised and believes, and therefore alleges the fact to be that said John Noel made the false representation as to the condition of the title to said property with the intention to deceive the defendant and to mislead it in the issuance of said policy of insurance AX#463255. That by the acceptance of said policy with said statement 11 contained therein as hereinbefore set forth said John Noel ratified and confirmed the said false representations so made by him or on his behalf in applying for said policy.

By way of a fourth affirmative defense to plaintiff's complaint the defendant alleges:

1.

The defendant incorporates herein by this reference each, every and all of the allegations contained in its first affirmative defense.

2.

That in said policy of insurance numbered AX 463256, statement 11 thereof is as follows:

> "Statement 11. The automobile described herein is paid for in full and is not mortgaged, except in the amount of $740.00, which is payable in monthly installments, subject to the terms, conditions, limitations and agreements of this policy, if any, under section 1 of the Schedule of Perils is made payable to Auto Loan Company of Yakima, Wash., as their interest may appear."

3

That the above statement was made by said John Noel to the defendant as an inducement for the issuance of said insurance policy and said statement written into said policy being the representation made by him to the defendant upon inquiry by the defendant as to the condition of the title to said property insured as to whether or not the same was mortgaged. [19]

4.

That in truth and in fact the truck described in said policy, to-wit, a 1928 White 5 ton Truck, S#132006, M.#GRB 1304, was not only mortgaged to the Yakima Auto Loan Company for the sum of $740.00, but at the time of the issuance of said policy was also mortgaged by chattel mortgage to Frank Noel for the sum of $8056.94, the said mort-

gage being dated January 3rd, 1929, and filed in the office of the County Auditor of Yakima County, Washington, on January 3rd, 1929, and being in force and unreleased and unsatisfied in the office of the County Auditor of Yakima County, Washington, from the date of the filing thereof, to-wit, January 3rd, 1929, until after the damage to said truck hereinbefore described, which occurred on June 26th, 1931, and that said mortgage was also recorded on September 11th, 1929, at page 86 of Book 58, Records of Chattel Mortgages of Umatilla County, Oregon, and remained unreleased and unsatisfied on the records of said Umatilla County, Oregon, at all times from the date of recording thereof until after the damage which resulted to said truck on June 26th, 1931.

5.

That the truth of said statement so made in the application of said John Noel for the policy issued thereon, was material to the issuance of said policy and without which the said policy would not have been issued, and that if the said John Noel had disclosed to the defendant the fact that the said property was also mortgaged to Frank Noel in the sum hereinbefore set forth or at all, the said policy would not have been issued to said assured, and that by reason of said misrepresentation on the part of said John Noel as to the condition of the title to said property, the defendant was deceived and was thereby fraudulently induced [20] to issue

said policy under conditions which affected the moral hazard thereof. That the defendant is advised and believes, and therefore alleges the fact to be that said John Noel made the false representation as to the condition of the title to said property with the intention to deceive the defendant and to mislead it in the issuance of said policy of insurance #AX 463256. That by the acceptance of said policy with said statement 11 contained therein as hereinbefore set forth said John Noel ratified and confirmed the said false representations so made by him or in his behalf in applying for said policy.

By way of a fifth affirmative defense to plaintiff's complaint the defendant alleges:

1.

The defendant incorporates herein by this reference all of the allegations, matters and things contained in its first affirmative defense.

2.

That in each, every and all of the policies of insurance herein referred to and described in said complaint, there is contained a statement numbered 10, as follows:

> "Statement 10. No company has cancelled or refused to issue any automobile insurance policy of the assured during the last three years, except 'No exceptions'."

That the above statement was made in the application by said John Noel for the issuance of each

of said insurance policies and was the representation made by him or in his behalf as to the facts contained in said statement as to whether or not insurance on the property described in said policies had theretofore within three years been refused or cancelled.

3.

That the defendant is informed and believes, and there- [21] fore alleges the fact to be that each and every of the trucks described in the said policies, and each thereof, within three years prior to the issuance of the policies described in said complaint had been insured in another insurance company or in other insurance companies and that said insurance company or companies so insuring the said property had cancelled the insurance upon same or had refused to issue any automobile insurance policy or policies upon the said property during the said period.

4.

That the truth of said statement 10 so made in the application of said John Noel for the policies issued thereon was material to the issuance of said policies, and each of them, and without which neither of said policies would have been issued and that if the said John Noel had disclosed to the defendant the fact that said property had been insured within the period of three years prior to the application for said insurance and insurance there-

on had been refused by other companies or if the said John Noel had disclosed in said application to the defendant the fact that said property had been insured in another company or companies and such insurance had been cancelled as to any or either of said trucks during the said period, neither of said policies would have been issued to said assured. That by reason of said misrepresentations on the part of said John Noel and covered by said statement 10, as to the condition of previous insurance upon said trucks, and each thereof, the defendant was deceived and was thereby fraudulently induced to issue said policies, and each thereof, which affects the moral hazard thereof. That the defendant is advised, and believes, and therefore alleges the fact to be, that said John Noel made the said false representations as to prior insurance upon said trucks with the intention to [22] deceive the defendant and mislead it in the issuance of said policies of insurance and each thereof.

By way of a sixth affirmative defense to plaintiff's complaint the defendant alleges:

1.

The defendant incorporates herein by this reference all of the allegations, matters and things contained in its first affirmative defense.

2.

That in each and every of said policies of insurance statement 6 contains the description of the

automobile and equipment, and that in policy AX #463254, the said automobile insured under said policy is represented to be a 1928 model White 5 Ton Truck, S.#138992, M.#5687, 6 cylinders, actual cost to assured including equipment $7,000.00, purchased new in August 27, which statement is not true in that the defendant is advised and therefore alleges the fact to be that the above described truck was a 1926 White 5 Ton Truck, purchased by the assured in 1927 at a price not to exceed $5,-000.00.

In policy AX #463255, the automobile thereby insured is described as a 1928 White 5 Ton Truck, S.#144846, M.#9381, 6 cylinders, actual cost to assured including equipment $7,000.00, purchased new in August 27, which statement defendant is advised and therefore alleges *his* false and that in truth and in fact the automobile described in said policy was a 1927 White 5 ton truck purchased by the assured at a cost not to exceed $4,-660.00.

In policy AX 463256, the automobile insured thereby is described as a 1928 White 5 ton truck, S.#132006, M.# G.R.B. 1304, 6 cylinders, actual cost to assured including equipment $7,000.00 purchased new by assured in August 27, which [23] statement defendant is advised and therefore alleges is false, and that in truth and in fact the automobile described in said policy was a 1926 White 5 Ton Truck, sold second hand to the assured in 1928 at a cost not to exceed $2059.00.

3.

That the truth of the statements made in statement 6 of each of said policies, the same having been made in the applications of John Noel for said policies, and each thereof, was material to the issuance of said policies, and each of them, and without which neither of said policies would have been issued, and that if said John Noel had disclosed to the defendant the fact that the said automobiles were not 1928 models, but were 1926 and 1927 models as hereinbefore alleged, and had disclosed to the defendant the actual cost of said trucks to him, the defendant would not have issued the said policies or either thereof to said assured. That by reason of said misrepresentations on the part of said John Noel as hereinbefore alleged as to the year models and the cost to the assured of said trucks, and each thereof, the defendant was deceived and was thereby fraudulently induced to issue said policies, and each thereof. That the year model of said trucks affects the actual value thereof and the costs of said trucks respectively to the *assure* affect the hazard of the insurance thereon and are material to the undertaking of the defendant in the issuance of said policies. That the defendant is advised and believes, and therefore alleges the fact to be that said John Noel made the said false misrepresentations as to the year model of each of said trucks and as to the actual cost thereof to him as set forth in said policies, and each thereof, with the intention to deceive the de-

fendant and to mislead it in the issuance of said policies of insurance and each thereof. [24]

WHEREFORE, having fully answered plaintiff's complaint, the defendant demands that said action be dismissed and that it have judgment against said plaintiff for its costs and disbursements herein incurred.

D. V. MORTHLAND,
Attorney for Defendant.

State of Washington,
County of Yakima.—ss.

D. V. MORTHLAND, being first duly sworn, on oath deposes and says:

That he is the attorney for the defendant above named, and is authorized to verify the foregoing amended answer on behalf of said defendant, and in that behalf he incorporates herein all of the facts and allegations above stated in said amended answer and that same are true as he verily believes. That this verification is made by said attorney on the ground and for the reason that said defendant is a non-resident corporation of the State of Washington, duly authorized to engage in the automobile insurance business in said state.

D. V. MORTHLAND.

Subscribed and sworn to before me this 14th day of April, 1932.

[Seal] FLOYD FOSTER,
Notary Public for Washington, residing at Yakima, Washington.

Service accepted and copy received this 14th day of April, 1932.

SNIVELY & BOUNDS,
Attorneys for Plaintiff.

[Endorsed]: Filed May 3, 1932. A. A. LaFramboise, Clerk. [25]

[Title of Court and Cause.]

REPLY TO DEFENDANT'S AMENDED ANSWER.

Comes now the plaintiff in the above entitled action, and by way of reply to defendant's amended answer, admits, denies and alleges as follows, to wit:

1.

As to the allegations in paragraph one of the affirmative defense on page one, of defendant's amended answer, the plaintiff specifically denies that John Noel made any representations or statements of any kind to the representative or agent of the defendant company at its office in Spokane or to any one else acting for or on behalf of the defendants, or at all, and that no authorized agent or agents of the said John Noel made any representations or statements for and on behalf of the said John Noel or at all, to the defendant or to its representatives or agents in Spokane, or any where else.

2.

As to the allegations contained in paragraph two of the affirmative defense on page two of said amended answer, plaintiff is not sufficiently advised at this time to either affirm or deny the same, but does state and allege that the Insurance Policy speaks for itself and said policy is an exhibit in [26] said cause and is on file with the records in said action.

3.

Denies each and every allegation, matter and thing contained in paragraph three of defendant's first affirmative defense contained in said amended answer, on page two thereof, and the whole thereof, save and except that the said plaintiff admits that the road referred to in said paragraph three at the place where the accident took place was an extremely steep grade, but specifically denies that either of the said trucks or the said steam shovel were being towed at that time, but alleges that each of the said trucks, as well as the steam shovel, were being operated, prior to the accident, by and on their own power and plaintiff specifically denies that the said trucks or the said steam shovel were being towed at any time.

4.

Denies each and every allegation matter and thing contained in paragraph four of the first affirmative defense, which said paragraph four is on page two

and three, respectively, of the defendant's amended answer, and specifically denies that the effective cause of the said damage to the said trucks and steam shovel, was due to towing.

5.

As to the allegations contained in paragraph two of the second affirmative defense on page three of the defendant's amended answer, plaintiff at this time is not sufficiently advised as to the specific clause referred to in said paragraph two, but alleges that the policy speaks for itself, and this plaintiff at this time neither affirms or denies said paragraph two. [27]

6.

As to paragraph three of the second affirmative defense contained in said amended answer, on page three thereof, this plaintiff denies each and every allegation matter and thing therein contained, and the whole thereof, and specifically denies that John Noel made any representations or statements to the defendant as an inducement for the issuance of said insurance policy. That the said assured at no time, or in any way, made any representations to the defendant company or to any one acting for the defendant company with intent to defraud or deceive said defendant company.

7.

Denies each and every allegation matter and thing contained in paragraph four of the second affirma-

tive defense, on pages three and four of defendant's amended answer, and the whole thereof, save and except that the plaintiff admits that there was an instrument known as a mortgage on file in Yakima County, Washington and in Umatilla County, Oregon, upon the trucks in question, which was unreleased of record, but specifically denies that the said mortgage had not been paid and fully liquidated.

8.

Denies each and every allegation matter and thing contained in paragraph five of the second affirmative defense on page four of defendant's amended answer, and specifically denies that the assured made any representations or statements either to the defendant company or to any one acting for or on behalf of the defendant company, and specifically denies that the said assured did at any time make any statements or representations to the defendant company or any one acting for or on behalf of the said defendant company with intent to defraud or deceive the said defendant company. [28]

9.

As to the allegations contained in paragraph two of the third affirmative defense on page five of the defendant's amended answer, the plaintiff is not fully advised as to the statement contained in the said paragraph two, so neither affirms nor denies

the same, but alleges that the instrument referred to in said paragraph, speaks for itself.

10.

Denies each and every allegation matter and thing contained in paragraph three of the said third affirmative defense, on page five of the said amended answer, and the whole thereof.

11.

Plaintiff denies each and every allegation matter and thing contained in paragraph four of the third affirmative defense on pages five and six of defendant's amended answer, and the whole thereof, save and except that the plaintiff admits that there was on file, both in the office of the County Auditor of Yakima County, Washington, and recorded in the Records of Chattel Mortgages in Umatilla County, Oregon, an unreleased mortgage on the three trucks in question, but specifically denies that the said mortgage in each instance, to wit; the one on file in Umatilla County, Oregon and the one on file in Yakima County, Washington, was unpaid. In other words, plaintiff states the fact to be that the said mortgage in each instance which was one and the same mortgage, was fully paid and this prior to the issuance of the three policies set forth in plaintiff's complaint.

12.

Denies each and every allegation matter and thing contained in paragraph five of the third

affirmative defense on page six of defendant's amended answer, and specifically [29] denies that the said assured at any time or in any way, to the defendant, or any one acting for the defendant, made false representations to them or it; or that the said assured authorized any one, at any time or in any way to make statements on his part or for him, that was intended to defraud or deceive the defendant.

13.

That the plaintiff is not presently advised as to the allegations contained in paragraph two of the fourth affirmative defense, on pages six and seven of the defendant's amended answer, so is not in a position to affirm or deny said allegations; but allege that the said instrument, which is marked as an exhibit and on file with the plaintiff's complaint in this case, speaks for itself.

14.

This plaintiff denies each and every allegation matter and thing contained in paragraph three of the fourth affirmative defense as set forth in said amended answer, on page seven thereof, and specifically denies that John Noel at any time, or in any way, or at all, made any statement or representation whatsoever to the defendant company.

15.

Denies each and every allegation matter and thing contained in paragraph four on page seven

of the plaintiff's fourth affirmative defense as set forth in its amended answer, and specifically denies that there was any mortgage other than the one referred to in the said policies on the said trucks, or the particular truck described in the said fourth affirmative defense that was unpaid, although this defendant states that it may have been that the said mortgage, at the time the insurance was issued, may have been unreleased of record. [30]

16.

Plaintiff denies each and every allegation matter and thing contained in paragraph five of the fourth affirmative defense, set forth on pages seven and eight of defendant's amended answer, and the whole thereof, and specifically denies that the said John Noel made any statements or representations whatsoever to the defendant company as alleged in said last referred to paragraph, and specifically denies that any representations were made by the said John Noel or any one for him, with intent to deceive said company.

17.

Denies each and every allegation matter and thing contained in paragraph two of the fifth affirmative defense, set forth on pages eight and nine of defendant's amended answer, and the whole thereof, and specifically denies that the assured made any statements or representations to the defendant com-

pany or any one for the company as alleged in paragraph two of the said fifth affirmative defense.

18.

Denies each and every allegation matter and thing contained in paragraph three of the fifth affirmative defense, on page nine of defendant's amended answer, and the whole thereof.

19.

Denies each and every allegation matter and thing contained in paragraph four of the fifth affirmative defense set out on pages nine and ten of defendant's amended answer, and the whole thereof.

20.

Denies each and every allegation matter and thing contained in paragraph two of the sixth affirmative defense set out on pages ten and eleven of defendant's amended answer, and [31] the whole thereof.

21.

Denies each and every allegation matter and thing contained in paragraph three of the sixth affirmative defense, set out on page eleven of defendant's amended answer, and the whole thereof.

As a further reply to said amended answer, and by way of an affirmative defense thereto; as to each of the alleged defenses set out in defendant's amended answer respectively, save and except the

allegations contained in the first affirmative defense, this plaintiff alleges:

1.

That subsequent to the 26th day of June, 1931, to wit: subsequent to the damage to the said three trucks, and the loss of the trucks, as described in plaintiff's complaint, and subsequent to the time the said company had notice of the damage and loss of the said trucks, the defendant company investigated the loss and damage to the trucks and visited the scene or place where the trucks were damaged, and consulted and advised with parties who were conversant with the facts surrounding both the issuance of the policies and loss under the policies, and advised with the assured and after said defendant company had investigated the damage and loss of the trucks in question and after the assured had given notice to the defendant company of his loss and demanded payment under the policies, the said defendant company issued and caused to be issued a notice wherein it declined liability and which said notice to the assured was upon the ground and by reason of the alleged towing, and not otherwise.

2.

That the notice and only notice received by the assured [32] or any one on behalf of the assured was the one just referred to in the preceding paragraph, and the same is in words and figures as follows, to wit:

"Main 5351

Max H. Wasson
Insurance Adjuster
Peyton Building
Spokane, Washington.

August 12, 1931.

Mr. John Noel
201—10th Avenue North
Yakima, Washington.
Dear Sir:

Your letter of August 6th, 1931 arrived during my absence from the city. I am just in receipt of advice from the Company calling my attention to the terms of the policy which provide that all collision coverage on these three policies are not applicable when the vehicle is being used for towing and I am therefore instructed to decline liability on all three policies.

I have not secured any more definite figures on the cost of repairing the trucks than the figure which was submitted by Mr. McCoy as it seemed to me that that was about the most fair figure that could be obtained. Several people have asked me about the sale of the salvage and I will be glad to have them get in touch with you if you decide you would rather sell the salvage than to pull them out of there and repair them.

Regretting the fact that the insurance was not in force at the time of the upset, I am,

Very truly yours,

MAX H. WASSON.

MHW:FC"

3.

That the said Max H. Wasson was a duly authorized and acting agent for the defendant company and was acting for and on behalf of the defendant company in declining liability.

4.

That the defendant company in declining liability, did so solely and entirely in virtue of the notice above set [33] forth and for the reason and on the alleged ground that the said trucks at the time and place set forth in plaintiff's complaint were being towed, thereby waiving any and all other defenses that the said defendant has or might have had, and that the said defendant is estopped from setting up and offering evidence in support of any and all other defenses, save and except that of towing.

Further replying to defendant's amended answer, and by way of an affirmative defense thereto, the plaintiff alleges:

1.

That the assured at or about the time the said policies were issued, caused to be paid to the defendant company, the sum of $206.00 as the premium

in full upon the said policies so issued by the defendant company, and that at the time of the loss and damage to the property covered by the said three policies, there was a large part of the said premium that had been unearned by the defendant company, and that the said company at no time or at all has tendered back or offered to pay to the assured or this plaintiff or any one for the assured or for this plaintiff, any part of the unearned premium, but has retained and appropriated it, the unearned premium, to its own use, and still holds all of said premium for the benefit and use of the defendant, and so it is that the defendant is estopped from offering any evidence in support of any and all of the alleged affirmative defenses, respectively, going to the defeat of the plaintiff's right of recovery under the said three policies, respectively, and is estopped and has waived any right that the said defendant may or might have had from offering any evidence going to the reduction of the claim or in mitigation of the amount due the plaintiff under the said three policies. [34]

Wherefore plaintiff asks for judgment for which he prays in his original complaint; and that the defendant be estopped from offering any evidence whatsoever under any and all of the affirmative defenses set forth in his amended answer.

SNIVELY & BOUNDS,
Attorneys for Plaintiff. [35]

VERIFICATION.

State of Washington,
County of Yakima.—ss.

This day personally appeared before me, the undersigned Notary Public in and for said County and State Frank Noel, who, having first been duly sworn by me, upon oath deposes and says:

That he is the plaintiff named in the foregoing reply to defendant's amended answer, that he has heard the same read over, knows the contents thereof and that the same are true as he verily believes.

FRANK NOEL.

Subscribed and sworn to before me this 6th day of May, A. D. 1932.

[Seal] I. J. BOUNDS,
Notary Public in and for the State of Washington, residing at Yakima, Washington.

Service accepted and copy received of the within reply this 7th day of May, 1932.

D. V. MORTHLAND,
Attorney for Defendant.

[Endorsed]: Filed May 9, 1932. A. A. Laframboise, Clerk. [36]

[Title of Court and Cause.]

VERDICT.

We, the jury in the above entitled cause, find for the plaintiff in the sum of $7500.00.

H. C. TEMPLE,
Foreman.

[Endorsed]: Filed May 11, 1932. A. A. LaFramboise, Clerk. [37]

District Court of the United States, Eastern District of Washington, Southern Division.

No. L-1681

FRANK NOEL,

Plaintiff,

vs.

UNIVERSAL AUTOMOBILE INSURANCE COMPANY, a corporation,

Defendant.

JUDGMENT ON THE VERDICT.

The jury impanelled to try the above entitled cause in this Court, having on the 11th day of May, 1932, returned a verdict in favor of the plaintiff in words and figures as follows, to-wit:

"District Court of the United States, Eastern District of Washington, Southern Division.

No. L-1681

Frank Noel,

Plaintiff,

vs.

Universal Automobile Insurance Company, a corporation,

Defendant.

VERDICT.

We, the jury in the above entitled cause, find for the plaintiff in the sum of $7500.00.

H. C. TEMPLE,

Foreman."

which verdict was ordered by the Court spread on the records of said Court.

WHEREFORE, IT IS ORDERED, ADJUDGED and DECREED that FRANK NOEL, do have and recover of and from the defendant [38] UNIVERSAL AUTOMOBILE INSURANCE COMPANY, a corporation, judgment in the sum of $7500.00, together with plaintiff's costs and disbursements in this action expended and incurred taxed at $76.20, together with interest on each of said sums at the rate of 6% per annum from the date hereof until paid.

Done in open Court this 16th day of May, 1932.

J. STANLEY WEBSTER,
Judge.

O. K. as to form.
D. V. M.,
Attorney for Defendant.

[Endorsed]: Filed May 16, 1932. A. A. LaFramboise, Clerk. [39]

[Title of Court and Cause.]

PETITION FOR EXTENSION OF TIME IN WHICH TO SERVE PROPOSED BILL OF EXCEPTIONS.

Comes now the defendant in the above entitled action by its attorneys of record and petitions the Court for an order extending the time for the preparation and service of a bill of exceptions in the above entitled action for the period of thirty days from this date, in order that sufficient time may be allowed for the transcription of stenographer's notes and proper preparation of the proposed bill of exceptions.

The verdict of the jury was rendered on the 11th day of May, 1932, and no extensions have heretofore been applied for or allowed.

Dated at Yakima, Washington, this 18th day of May, 1932.

D. V. MORTHLAND,
HAROLD A. SEERING,
Attorneys for the Defendant.

[Endorsed]: Filed May 18, 1932. A. A. La-Framboise, Clerk. [40]

[Title of Court and Cause.]

ORDER GRANTING EXTENSION OF TIME IN WHICH TO PREPARE AND SERVE A BILL OF EXCEPTIONS.

The above entitled action coming on regularly for hearing before the Court upon the petition of the defendant for an order extending the time and term in which a bill of exceptions may be prepared and served in said action, and it appearing to the Court that additional time should be given for the transcription of stenographer's notes and preparation of such bill of exceptions, and the Court being fully advised in the premises,

IT IS NOW THEREFORE HEREBY ORDERED that the time for the preparation and service of a bill of exceptions in the above entitled case be, and the same hereby is extended for the period of thirty days from the date of this order.

Done by order of the Court this 18th day of May, 1932.

J. STANLEY WEBSTER,
Judge.

[Endorsed]: Filed May 18, 1932. A. A. La-Framboise, Clerk. [41]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, That on the 11th day of May, 1932, the above entitled action came on for trial in the above entitled Court, the Honorable J. Stanley Webster, District Judge, presiding, the same being tried before a jury, and certain proceedings were had, which are hereinafter set forth and which are presented in support of defendant's exceptions to the ruling of the Court in the course of the trial of said action, which exceptions are as follows:

(a) The defendant's exception to the ruling of the Court granting plaintiff's motion at the conclusion of all evidence in the case to withdraw from the consideration of the jury the evidence offered in support of defendant's first affirmative defense, to-wit, that the trucks and shovel were being towed within the provisions and meaning of the insurance policies admitted as and which are hereinafter referred to as exhibits in the case;

(b) To the Court's ruling denying the defendant's motion interposed at the close of all of the evidence of the case to withdraw from the consideration of the jury all evidence of the value of the trucks introduced by plaintiff on the ground that the valuation testified to by plaintiff's [42] witnesses as of January 1st, 1931, was not competent evidence to prove the value of the trucks at the time of the accident in June 1931;

which exceptions were duly saved as provided by law at the time of said ruling and which are hereinafter specifically set forth.

Defendant submits in support of said exceptions the following evidence admitted in the case:

After statement of plaintiff's counsel to the jury there was offered and received in evidence without objection three insurance policies descibed in the complaint and marked Exhibits "A", "B", and "C", and the assignment from John Noel to Frank Noel of the causes of action upon said policies, which was introduced as Exhibit "D."

JOHN NOEL

was called and sworn as a witness for the plaintiff and testified as follows:

Witness had lived in Yakima 30 or 31 years; was married, now living with his father at Yakima. Witness paid the premium on the policies in evidence and no part of the premium has been tendered, offered or paid back to witness or any one for him. The three trucks that were covered by the policies in evidence went over the bank and were wrecked. He was not near them but was at the scene of the accident from three to five minutes later. He had been there a short time before and went to move a car a few minutes before the accident. Witness saw the trucks within two weeks before the trial and had other parties there to see

(Testimony of John Noel.)

if there was any salvage and in the judgment of the witness there was no salvage. It would cost more to get the stuff out than it was worth. It was 57 miles from Pendleton, Oregon. The trucks are down a canyon two to three hundred feet below the road where they rolled or dropped down over a cliff. Witness [43] bought the trucks and was the owner of them at the time the policies were issued. They cost $7,000.00 apiece and had been used three or four years. Two were bought in August, 1927, and the other was bought in 1926. The trucks were number 52 White trucks which are all sold by model number. The value of the trucks at the time the policies were issued was around $5,000.00 apiece.

Witness received notice from the insurance company declining liability in the case (notice admitted in evidence as Plaintiff's Exhibit "E"). No part of the insurance has been paid or offered to witness, nor to any one for him. Witness has no interest in the claim now.

On

Cross-examination

witness stated that he was familiar with the trucks as the policy numbers applied to them. Witness referred to the bill of sale and stated that same referred to the truck having motor number 5687, and that the truck was purchased on conditional sales contract with another truck, which were purchased July 25th, 1927, and refers to policy (Ex-

(Testimony of John Noel.)

hibit "A") No. 463254. That witness bought the truck, engine No. 9381, also in 1927, covered by policy 463255. $7,000.00 was paid for each of the trucks described and the price in the contract was for the chassis. Witness had memorandum relative to truck containing Motor No. GRB 1304 covered by policy number 463256, which was the same truck described in policy marked Exhibit "C." This truck was purchased in July or August, 1926. The truck was described in the policy as a 1928 truck. One truck was bought in 1926 and the other two in 1927. Paid around $7,000.00 for that truck. Trucks were purchased on conditional sales contract and one of them had been repossessed and repurchased by witness under conditional sales contract admitted in evidence as Defendant's Exhibit 2. The trucks had been used in California hauling rock and dirt and were used from the middle of August to the [44] 1st of November in 1927 and 1928. They were used in the Naches Pass Highway, near Yakima, being used in road work in rock hauling. In the year 1928 were used up to the first part of November. Were brought to Yakima and not used in the winter. In the spring of 1930 they were on the Kittitas job. In 1929 they were used in digging a few basements and a little work on the South Naches River Road. They were used in the spring of 1930 on highway work on the Kittitas job. They were there used for two or two and a half months. They were then brought

(Testimony of John Noel.)

back to town and overhauled and the 12th of July witness left to go on the job in Oregon. Started work around the middle of August and they were used in road work from about the middle of August to the 19th of November. Had very little trouble with the trucks. Witness came back to Yakima and the trucks were left on the job in Oregon out in the open. Witness later went down to bring them out. At the time he talked to Mr. Doran about insurance, which Doran insisted upon having, did not know anything about the insurance except that witness held the policies. The trucks and equipment were equipped with hooks front and back for towing purposes. In June the witness started to bring out the equipment and was present when they started the trucks from the camp. The shovel was half a mile or three-quarters mile past the camp in the direction in which the equipment was being moved. It was 8 or 10 days from the time they left camp until they reached the foot of the grade where the accident happened being delayed on account of rain. They were bringing out a steam shovel, three White trucks, air compressor, one truck load of diesel oil and another truck with small stuff on. On the morning of the accident the trucks were taken up ahead of the shovel a couple of miles and parked there and the shovel was brought up later. [45] On the morning the trucks went over the road, they started from a block to two

(Testimony of John Noel.)

blocks from where the accident happened or probably a little farther, around a quarter of a mile.

The witness was not present when the accident happened. Was a quarter of a mile or a little farther away. He was with the shovel just before the accident happened, 15 or 20 minutes. When he got back the shovel was tipped over but there was a few minutes before it went down the cliff. He reached the place 4 or 5 minutes after the trucks went over.

Redirect Examination.

Bills of sale (Plaintiff's Exhibits "E" and "F") were admitted in evidence.

Witness stated that after he bought the chassis, the bare truck, he bought a spotlight, body, hoist, air and oil cleaner, and taking into consideration the extra equipment, the truck cost $7,000.00. The body and hoist cost $885.00. The air and oil cleaner cost $34.00 and I paid freight on the body and hoist from Seattle to Buck's ranch in California. I forgot what that was and it cost me I think $50.00 on each body and hoist to get it there. This equipment was all on at the time the trucks were insured.

On

Recross Examination

the witness stated that the additional equipment referred to was placed only on the first two trucks that were bought. The one bought in 1926 cost

(Testimony of John Noel.)
about $3,000.00. They were stored in the Yakima Hardware warehouse. $885.00 was paid for body and hoist and $24.00 for permanent oil cleaner and $50.00 extra expense in getting them there. There was a spotlight and I wasn't satisfied with the body as it came and I bought a big boiler plate in the bottom. I forgot what that cost. I remember the permanent oil job for $24.00. I couldn't tell the amount of the other items. All this equipment was on the trucks at the time they went over the hill. [46]

R. F. STARR,

called and sworn as a witness for the plaintiff, testified as follows:

Witness lives at Yakima, four years. Business, truck salesman for Bell-Wyman. Has handled for the past several years White Trucks and was familiar with Model 52. The White trucks are determined by model and Model 52 has been manufactured and sold over a period of four years and is still sold. Model 52 was a White 5 ton truck and in 1927 the chassis was built for approximately $6,000.00, and with the equipment for road work was around $7,000.00. Witness has seen these particular trucks at his father's place where he kept them, and saw them since when they were working on Naches Pass.

No cross-examination.

FRANK NOEL,

called and sworn as a witness for the plaintiff, testified as follows:

Witness is plaintiff in this case and the owner of the claim by assignment from his son. Neither the company nor any one for the company has offered or tendered the premium.

No cross-examination.

J. R. HICKEY,

called and sworn as a witness for the plaintiff, testified as follows:

Witness lives at Spokane, has been in the contracting business for last two years. Was with the three trucks in the care of John Noel when they were on the job for the period of three months. Witness was foreman on that job and trucks were handled under his directions. Witness took the trucks November 18th, 1930, when they stopped work, parked them all along the side of the camp, locked them up and raised the beds because the snow is deep. He jacked up the trucks and put blocks under them. The three trucks at the time the last work was done on that job were all in working condition and were working up to the time the snow chased [47] them out. Witness has worked along with White 52 trucks as foreman on the job and the trucks were in good serviceable condition.

(Testimony of J. R. Hickey.)

On

Cross-examination

witness stated that he directed the work of the trucks but did not repair same as they had a truck driver and mechanic. At times he paid attention to the repair work and at times he didn't. He was there when the trucks were to the side of the road and had some work done which was temporary repairs. The trucks were taken off the job for repairs at times the same as any other trucks. No, one of the trucks was not broken down most of the time. No work was done after November 18th.

Plaintiff Rests.

At this time D. V. MORTHLAND, counsel for defendant, stated on behalf of the defendant: We shall rely only upon our first affirmative defense in this action, the one in regard to towing, and desire to take the other affirmative defenses, numbers 2 to 6 inclusive, from the jury.

JUDGE.—Very well.

Mr. Morthland made his opening statement to the jury.

Mr. Bounds, for the plaintiff, moved the Court for a directed verdict in favor of the plaintiff for the reason that the insurance premium of $205.00 had been paid to the company and that there was

no offer of payment or tender back of any unearned premium.

The motion was denied.

Thereupon

C. A. CASE,

was called and sworn as a witness for the defendant, and testified as follows:

Witness resides at Helix, Oregon, and in June, 1931, was employed by the Shell Oil Company. It was his business to drive back and forth on the North Fork of the John Day highway, that being the road upon which the upset occurred. He saw the equipment of John Noel being taken out of the place [48] where it had been working in Umatilla County, Oregon, along the John Day highway. Witness delivered oil and gas to the contractor's camp where the equipment had been working. Witness met Mr. Noel at the time and on the morning of June 26, 1931, witness was taking gas to Bowers & Bowers Camp on the North Fork of the John Day highway. Witness saw the equipment at that time starting up the John Day grade about a half or a quarter way up the grade. Witness had made arrangements with Mr. Noel the day before that he would wait at the place where the equipment had been parked that night so that witness could get back by him in the morning and they waited there until witness got back from

(Testimony of C. A. Case.)

Bowers & Bowers camp. When witness got back to the place where he had passed his equipment in the morning the equipment was then approximately six to eight hundred feet on up the grade from where he had passed it in the morning. He stopped the truck below them at the place where he had passed them that morning, and walked up the hill to the place reached by the equipment. He could see the equipment part of the way as he walked up the grade and as he was just coming up it was moving up the grade. When he got up there he saw the equipment moving for just a short ways. The trucks were tied or fastened together. There were three trucks, and were fastened or chained together. The trucks were chained to the shovel when the witness first came up. The trucks were in front of the shovel and up the hill and ahead of same. The trucks were on the traveled portion of the highway at that time and they were on the point of starting to work around the curve in the road and had made just a few feet. The trucks were all moving forward and the chains or cables were tied between the trucks and between the trucks and shovel and when witness reached the equipment it was stopped and they were fixing some piece of equipment. They were fixing the equipment for approximately [49] 30 minutes after witness got there, and the motor on the lead truck stopped. The driver was taking off the magneto to replace it. The chain from the third or rear truck was un-

(Testimony of C. A. Case.)
hooked from the shovel. It was a heavy log chain and attached to a tow hook on the truck. The trucks were all equipped with tow hooks. While they were working on the shovel the chain was unhooked from the truck and Mr. Noel hooked it on the truck while I was there and the shovel runner and oiler, or his assistant left the place. There were five men working with the outfit and when the caravan was moving up the hill. One was working upon each truck and the shovel runner and his assistant upon the ground. The shovel runner and his assistant left the place. They were instructed by Mr. Noel to go back and get a magneto. Of the other two men, the driver of the truck in the lead was working upon that and the other and myself started back to where my truck was parked. Mr. Noel started to his car, which was parked ahead, and no one was left but one of the drivers, known as Pete. The other driver went back with witness to his truck. When the truck driver and witness went back down the hill the engine on the truck which was driven by him was running and the engine on the shovel was running. Witness reached his truck. He ate lunch and when nearly through saw smoke from near the equipment. He could not see the equipment from where he was eating lunch. The equipment was left upon a steep grade. It was a narrow grade built upon the side of the mountain, probably ten feet wide, the outer edge had been cleared up where rocks filled in and

(Testimony of C. A. Case.)

would raise about 2000 feet in five miles of continuous grade. After witness saw the smoke he went back up the hill with the truck driver who had walked down with him and when they got to the place where the trucks had been left Mr. Noel and Pete were standing there. [50] The shovel was on fire, laying just below the grade where it had apparently just tipped over. Of the three trucks two of them at that time were down over the cliff and one was part way down. They were about 200 feet or more from the place where they had been standing on the road. As they came up Mr. Noel was inquiring from Pete what happened and Pete replied "I don't know." There was no other particular conversation relative to the equipment going over the cliff. Pete said he was standing upon the running board and front wheel when it went out from under him and left him on the ground.

On

Cross-examination

witness stated that the trucks and shovel were just moving into position on the grade when he first saw them about three feet. He had not passed them that morning as they were going up the grade. They were stopped when witness came along. He could not say that the trucks at any time were not on their own power. It was hard to determine that the trucks were towing one another and were towing or pulling the shovel. They were moving

(Testimony of C. A. Case.)

ahead as far as witness knows on their own power. When witness got up to the trucks and shovel, there were four employees and Mr. Noel. Witness knows the employees by sight. There were some one working under the steam shovel. There was a cable or chain between the steam shovel and the three trucks and the trucks next to them. It was fastened when witness noticed. It had to be unfastened so that the workmen could get under the shovel and it was fastened again. Witness did not go beyond the shovel. The three trucks were in front of the shovel. Witness did not know what was between them in looking up, but was guessing. Witness did not see the chains or cables between the trucks and did not go by the back truck or by the shovel.

[51]

Upon motion testimony of witness was stricken except as in so far that witness testified he saw the log chain fastened from the third truck to the steam shovel which followed. With that exception the testimony of witness with respect to the manner they were fastened, the towing or fastening is stricken from your consideration.

When witness left the steam shovel, Mr. Noel and Pete were there and Mr. Noel left about the same time, going up towards his car and witness went back. The witness' truck was about six or eight hundred feet from the steam shovel, and it was 10 or 15 minutes before witness saw the smoke. Wit-

(Testimony of C. A. Case.)

ness then walked back to the scene of the accident. The first thing that attracted the attention of witness was the shovel on fire over the grade. It was 10 or 12 feet below the road laying upon its side. After the fire had burned on it for quite a little bit, it went on down. It remained in its position on the side of the hill about five minutes. Witness did not see it go from the road down to its position off the road. Witness stayed a short time after the accident but did not see any chain or cable laying in the road but could not say it wasn't there. Witness did not look for the chain but would have noticed it if it were being picked up out of the road as witness passed by it after he got up there. The others went down to the cab. There was another car parked ahead.

On

Redirect Examination

witness stated that when the man was working under the shovel the chain was unhooked in front and after witness saw him working the chain was hooked up to the shovel again. Witness traveled over the road after the accident occurred about an hour or an hour and a quarter later. The side or part of the road where the trucks had gone over had broken off about the width of the tread of the equipment. Witness drove in towards the bank in order to get by [52] the place of the accident.

(Testimony of C. A. Case.)

On

Recross Examinaton

witness stated he saw Mr. Noel hook the chain between the truck and the steam shovel. He hooked it to the shovel by taking the chain up and putting it over the bar on the front end of the shovel over a projecting bar put there for that purpose. Witness was there at that time and all of the men were there.

JOHN NOEL

was called as an adverse witness for defendant and testified as follows:

The truck that had the diesel oil was parked about one block and a half from where the shovel was parked, and the other two trucks were kept at the camp, about three miles away. The shovel was a block or two above the bridge. The truck was started at the bridge and the other two trucks came up to get ahead of the shovel. All three trucks were ahead of the shovel. The truck with the fuel oil was hauled up ahead of the shovel. The truck at the bridge was in the middle, and one truck left at the camp was in front of the shovel. The trucks were fastened together with a chain or cable. The lead truck was fastened to the second truck with a long twisted cable. The front and rear truck hooked up were 30 to 40 feet apart. These trucks had

(Testimony of John Noel.)

hooks at each end for towing. They are put in front and rear for pulling when one truck is stuck. They had a cable between the first and second truck when we started out that morning and a big chain between the second and third truck was fastened to the trucks by means of hooks. And between the third truck and shovel he had a big heavy log chain. And when they started up the grade that morning the equipment was fastened together in the manner just described and they continued to have them fastened together in that manner until they got to the place where they had difficulty in getting around a rocky corner and stopped. At this time they stopped near the place where the upset occurred. The last truck and second truck were hooked together, the [53] first truck and the second truck had that big twisted cable, and witness did not know how long it had been undone but when he got to the front truck that cable had come loose at the front truck and was twisted in a big kink in a big pile in front of the second truck. It was an old rusty, twisted cable. The trucks were cabled together for trouble and to use precaution for moving up the big hill. Were trying safety first. It was a narrow road and if one truck went down a little then the other trucks would have held it on. If the shovel slipped down over the bank they expected to hold it and if one truck slipped down one side witness would expect the other trucks to hold it. There had been some trouble

(Testimony of John Noel.)

with the gears slipping in the shovel a few days ago. The gears would slip and they had trouble with the links on the caterpillar part of the shovel. The shovel was a caterpillar tractor with a shovel, cab, boiler and bucket placed on top of it, and the caterpillar carried it about, moving it in place on its own power. The caterpillar part carried the other equipment. They had trouble with the links on the caterpillar after they got going on the highway. The road was muddy and snapped off a few of the links and witness had a couple put on which he had brought that morning from Pendleton. The shovel and tractor weighed about 42 to 45 tons. The proof was put into the insurance comapny in which witness made the statement that when the trucks were pulling all three trucks were running and the shovel was also running on its own power so that they would act as an anchor in case the shovel should go backwards, or in case something should break and at the same time they would help the shovel up the grade and it would help us to make better time. Witness stated that he did not say anything about making better time but that the signature on the typewritten statement was [54] his signature. Witness told the adjuster that the trucks were fastened together during the time they were pulling up the grade that morning and that the trucks would act as an anchor if they went down but was positive he did not tell him that they would help the shovel make better time going up

(Testimony of John Noel.)
the grade. The witness remembered speaking about the shovel slipping off the grade and that must have been the grade where it was wrecked. The shovel had been slipping when they were bringing it out as they had had a good deal of rain. The trucks had not been towing it at that time nor did the trucks help it out of any place. It was found necessary to have the trucks hooked on ahead to help in case anything happened. Witness was present at the place where the upset had occurred but had left the shovel and had gone up to his car and only Mr. Briere was left at the place when he went up to his car. He was working under the hood trying to take a cap or bolt off under the magneto on the front truck. Don Stroupe, Mr. Case and witness were near the shovel when witness left to go up to his car and they started out together. They went one way and witness went the other. At that time the engine on the shovel was running and the motor on the lead truck was running, though witness was not sure. Could not say for sure whether the motor on the third or rear truck was running at that time. Witness did not hear any noise while he was up at his car and was not able to see the caravan of trucks when he was at his car. He was there five or six minutes and had walked all the way back and was where the trucks were before he noticed they were gone. The road was 9 or 10 feet wide and he walked down from the car about a quarter of a mile. He did not see that the

(Testimony of John Noel.)

trucks were gone till he was standing right about where the trucks were standing when he left. There wasn't anybody [55] there at that time. Witness jumped to the side of the road. He thought Mr. Briere had gone down the bank. Briere had stepped over the side of the bank to see where the trucks were gone. At that time the shovel was half in the road and the outside truck had slipped off, leaning pretty well out.

Mr. Case and Don Stroup were walking up the road and witness was walking down in the road, down to the shovel, and they were coming back up.

On

Cross-examination

witness stated that the road from the shovel up to where he parked his car, veered around and he could not see where it ran. The trucks were hooked together in case of an emergency. The shovel had no brake on it. It is held by gears and as long as it is geared you don't need any blocks under it and if it is not geared you would need blocks. He had hooked the trucks and shovel together about 200 feet from where the accident happened and they had been hooked together for that distance. The trucks and shovel were all on their own power. That is one wasn't pulling the other at any time. Pete was working on the front truck. He never did go back to the shovel. The front truck was not hooked to the second. The rear truck was

(Testimony of John Noel.)

hooked to the shovel. Witness tried to move the chain hooked between the rear truck and shovel. It was hooked round the shovel with an eye on one hook and a guy above on the other. He hooked the chain between the frame of the shovel and placed through the eye and hook on the back of the rear truck. When one of the shovel runners tried to get under there this big log chain was in his way and I tried to move it around and Joe Brinier came up and picked it up and unhooked it and threw it to the side and it landed over to the side of the road and was not touched. When I got back the cable had [56] come off the front and was on the side of the road. The chain was where Joe had thrown it along side of the road. The signature to the written statement is my signature signed at the Benjamin Franklin Hotel in Seattle in the presence of my wife and Mr. Wasson, the adjuster. He had met Mr. Wasson the night before at eight o'clock at the Benjamin Franklin Hotel and was with him until six or seven the next morning. Mr. Wasson furnished liquor and we were all drinking. We drank two quarts and went downstairs to another room and drank in some one else's room. Mr. Wasson was with him and witness had not been to bed before signing the statement. Mr. Wasson wrote the statement in pencil first. Witness had not seen the statement since until today.

(Testimony of John Noel.)

On

Redirect Examination

the witness stated that he read the statement over before he signed it and was part sober anyway when the typewritten statement was made out. He thought he knew what he was doing and he and his wife both read the statement over but did not talk about the various things in the statement, did not object to any part of it and never struck any of it out. In the statement made to Mr. Wasson gave the complete history of his contract and told the adjuster how he was bringing the equipment out just like he stated in his testimony but did not tell Mr. Wasson about helping the shovel up the hill and nothing was mentioned at that time. Witness stated that he would say that that part had been wrote over. Witness did not have a copy of it nor had he asked for a copy of it.

JOE BRINIER,

called and sworn as a witness on behalf of the defendant, testified as follows:

Witness lives at Blewitt Pass. In June, 1931, he was working for Noel helping to get the equipment out. Witness was oiler on the shovel and working around helping to get the equipment out. When they started in with the shovel on the [57] day the accident happened they started a couple hundred

(Testimony of Joe Brinier.)

feet from where the bridge was. The front truck was hooked to the second, the second with the old compressor was hooked to the third and the third to the shovel with the cable, twisted and all kinked up. An eye had been made to use between the first two trucks. The distance between the trucks was 30 to 35 feet. The second truck was fastened to the third truck with a heavy log chain and there was about 20 feet between them. The third truck was fastened to the shovel about 20 feet. When they started out that morning the trucks and shovel were fastened together in the manner described with the cable and chains. They had not been fastened together during the whole time they were traveling with it that morning but just before they got to the steep part and from where they were parked had probably gone two or three hundred feet hooked together with the cable and chains. They continued to be chained and cabled together for about 300 feet. The road was steep and rocky on the right hand side of the shovel and the rod stuck out and hit that rock and bent and it couldn't steer and we re-sawed back and forth a little bit. He unhooked the shovel and trucks because with that bent bar he couldn't steer. He had to get the chain out of the way before he could turn the shovel in any way. They were just about around the point when the front truck stopped, magneto dead and was moving the second truck on ahead but the second truck was pretty close and we parked and let it set and went

(Testimony of Joe Brinier.)

back and got the magneto. There would hardly be room to work by over the steep bank. The front truck was right in the road, they were all in the road because they couldn't get anywhere one side was rocky and steep cliff. The other two trucks were running up close to the front truck and let them coast back again and stop about [58] 20 or 25 feet from the front one and noticed the old kinky cable had come loose and was twisted up in front of the second truck. Witness stated he did not know when the cable came loose. The old kinky cable was laying there. It came loose a couple of times before that. Witness went back to help the shovel runner and was stopped there for an hour. They were trying to get the rod back. After that the shovel runner and witness went back to get a magneto at the camp. John Noel and Pete Briere were left at the trucks. Don was there and Mr. Case of the Shell Oil Company. Witness and shovel runner went away first. They were away probably half or three-quarters of an hour and came back. When they got back with the magneto they saw smoke a little ways before they got there and met Johnny and the Shell man and Don Stroup when back down the road aways, and was told what happened. They didn't seem to know just what did happen. They were all excited and could hardly talk. The shovel and everything was down at the bottom of the hill when witness got back. The trucks were running in low gear in climbing the

(Testimony of Joe Brinier.)

hill. The shovel is geared much lower than the trucks and there was no comparison with the pulling. The trucks went ahead, worked around, and left slack between them in case something went wrong with the shovel. "We would go a ways and it would tighten and we would give hand signals—the shovel behind so there was no use of pulling because one pulled against the other." Every once in a while they would have to stop. If the shovel had slid or any of the trucks had slid one could help the other.

On

Cross-examination

the witness stated the trucks and shovel were fastened together in case something should go wrong with the shovel. That was to hold the steam shovel so it could be blocked. The trucks and shovel were on their [59] own power, and there was no time the trucks and steam shovel were not travelling on their own power. Witness unhooked the chain between the last truck and the shovel and threw it out of the way, and it laid there all of the time. It was at the shovel after the accident. Witness had not worked for Mr. Noel at any time after the accident. The cable was laying in the road and was still there. It did not go down to the trucks.

J. B. JONES,

called and sworn as a witness for the defendant, testified as follows:

Witness lives at Portland, Oregon, and is in the truck business. Witness is familiar with White trucks and has used them three years. Has bought and sold used White trucks. He saw the trucks that went over the grade on the John Day highway in Umatilla County, Oregon, a short time after they went over the grade. He went down to where the trucks were. Witness is acquainted with the value of salvage of trucks of this kind that have been in a wreck. That the trucks in the position in which they were in, were worth $100.00 each. There were three trucks. Witness was familiar with used 52 White trucks in the Eastern part of Oregon on June 26, 1931, the same being 1926 and 1927 White trucks used in general road work during the seasons 1927, 1928, 1929 and 1930, in good mechanical condition and stated that just prior to this accident these trucks were worth $2,000 each.

On

Cross-examination

witness testified that he had not seen these particular trucks prior to the accident. He saw the equipment there at the time he examined them. He did not know what equipment had been put on the trucks. He didn't know of any White 52 trucks sold in Oregon in the spring of 1931.

CHARLES C. PELTON

was called and sworn as a witness [60] for the defendant, and testified as follows:

Witness lives in Vancouver, Washington, is a truck salesman, selling White and Indiana trucks. Has been in the business since 1920 and is familiar with White No. 52. His territory is 16 counties in Oregon, including Umatilla County, where the accident occurred. He saw the trucks on a Sunday in July after the accident happened and went down the hill where the trucks were. Witness is familiar with salvage value of trucks and estimated the value of these trucks at the place where they lay at $50.00 apiece. Witness states that if the trucks were in good mechanical condition he could sell them for about $2700.00 each, but that he could not give an accurate answer as to their fair market value in Umatilla County, Oregon, at the time of the accident without having seen the trucks before the accident.

Defendant Rests.

Thereupon the plaintiff moved the Court that every question be taken from the jury save and except that of the value of the three trucks, and that the defendant's first affirmative defense be withdrawn from the consideration of the jury.

The motion was granted, to which defendant excepted and its exception was allowed.

Thereupon the defendant moved the Court for an instruction to the jury submitting same solely upon the evidence of defendant's witnesses as to the value of the trucks at the time of the accident, the measure of damages being the difference between the fair market value of the trucks at the time and place of the accident, before same occurred, and immediately after the accident occurred, and that the jury be instructed to disregard the testimony of John Noel, the only witness who testified on the question of value for the [61] plaintiff herein. He stated that at the time the policies were issued the trucks were worth $5,000.00 each. On the ground that said evidence is not competent under the law fixing the measure of damages and that the time of such valuation was too remote.

The defendant's motion was denied, to which defendant excepted and its exception was allowed.

[62]

I, J. Stanley Webster, Judge of the above entitled Court, and the Judge before whom the above entitled cause was tried, do hereby certify that the matters and proceedings embodied in the foregoing Bill of Exceptions are matters and proceedings occurring in said cause and the same are hereby made a part of the record herein.

I do further certify that the same contains all of the material facts, matters and proceedings heretofore occurring in said cause and not already a part of the record herein pertaining to the defendant's exceptions taken and allowed at the same trial.

I do further certify that Plaintiff's Exhibits "A," "B," "C," "D," "E" and "F" and Defendant's Exhibits 1 and 2 are the only exhibits received in evidence on the trial of the above named cause which pertain to the exceptions taken by said defendant.

Done in open Court, this 14th day of July, 1932.

J. STANLEY WEBSTER,
District Judge. [63]

ACCEPTANCE OF SERVICE.

Service of defendant's bill of exceptions accepted and copy thereof received this 13th day of July, 1932.

SNIVELY & BOUNDS,
Attorneys for Plaintiff.

[Endorsed]: Filed July 14, 1932. A. A. LaFramboise, Clerk. [64]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL.

Comes now the defendant in the above entitled action and moves the Court for an order granting

it a new trial therein on the ground and for the reason:

A. Insufficiency of the evidence to justify the verdict.

The above is based upon the failure of the jury to allow a deduction of $100.00 in the recovery on each policy in view of the fact that the policies were "100.00 deductible" policies.

Said motion is also based upon the fact that the only evidence of the value of the trucks at the time of the accident was given by witness of the defendant, who placed their value at $2,000.00.

That in view of the above two errors the jury allowed $600.00 on each truck in excess of their value as disclosed by the only competent evidence in the case.

B. Error in law occurring at the trial.

The foregoing claim of error is based upon:

1. The ruling of the Court on plaintiff's motion to withdraw from the consideration of the jury the evidence pertaining to defendant's first affirmative defense, to-wit, that the trucks and shovel were being towed within the proper meaning of the policies, and [65]

2. The Court's denial of defendant's motion to withdraw from the consideration of the jury all evidence of the value of the trucks introduced by plaintiff on the ground that the valuation testified to by Mr. Noel as of January 1st, 1931, was not

competent evidence to prove the value of the trucks at the time of the accident on June 26, 1931; that is, the case should have been submitted to the jury on the question of valuation solely upon the testimony of the witness J. B. Jones that the trucks were worth $2,000.00 each and the salvage $100.00 each.

Dated at Yakima, Washington, this 11th day of June, 1932.

D. V. MORTHLAND,
HAROLD A. SEERING,
Attorneys for Defendants.

Service of a copy hereof admitted this 15th day of June, 1932.

SNIVELY & BOUNDS,
Attorneys for Plaintiff.

[Endorsed]: Filed Jun. 13, 1932. A. A. LaFramboise, Clerk. [66]

[Title of Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION FOR A NEW TRIAL.

The above entitled action coming on regularly for hearing before the above entitled Court and the Honorable J. Stanley Webster presiding, upon defendant's motion for a new trial, and the matter being argued to the Court by counsel for the respective parties, and the matter being duly and finally submitted, and the Court being fully ad-

vised in the premises, denies each and every part of said motion and the whole thereof, and the same is so ordered, to all of which the defendant excepts and an exception is allowed.

Done in open Court this 14th day of October, 1932.

J. STANLEY WEBSTER,
Judge.

Form O. K.
D. V. Morthland.

[Endorsed]: Filed Oct. 14, 1932. A. A. LaFramboise, Clerk. [67]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable J. Stanley Webster, Judge of the District Court:

Universal Automobile Insurance Company, your petitioner, who is the defendant in the above cause, prays that it may be permitted to take an appeal from the judgment entered in the above cause on the 16th day of May, 1932, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith.

And your petitioner desires that said appeal shall operate as a supersedeas (the judgment in said case having been entered for the sum of $7,500.00), and therefore prays that an order be made fixing the

amount of the security which said defendant shall give and furnish upon such appeal, and that upon giving such security all further proceedings in this Court be suspended and stayed until the determination of said appeal by the Circuit Court of Appeals.

Dated the 26th day of October, 1932.

D. V. MORTHLAND,
HAROLD A. SEERING,
Attorneys for the Defendant.

[Endorsed]: Filed Oct. 26, 1932. A. A. LaFramboise, Clerk. [68]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the defendant in the above entitled cause and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause from the judgment of this Court entered on the 16th day of May, 1932;

1.

The Court erred in granting plaintiff's motion at the conclusion of all of the evidence in the case to withdraw from the consideration of the jury the evidence offered in support of defendant's first affirmative defense, to-wit, that the trucks and shovel were being towed within the provisions and meaning of the insurance policies admitted as evi-

dence in the case and marked Exhibits "A," "B" and "C."

2.

The Court erred in denying defendant's motion interposed at the close of all evidence in the case to withdraw from the consideration of the jury all testimony as to the value of the trucks introduced by plaintiff on the ground that the valuations testified to by plaintiff's witnesses were not competent to prove the value of the trucks at the time of the damage thereto on June 26th, 1931, and that said evidence was based upon an incorrect rule of damages. [69]

Wherefore, defendant prays that the said judgment may be reversed and for such other and further relief as to the Court may seem just and proper.

Dated at Yakima, Washington, this 26th day of October, 1932.

D. V. MORTHLAND,
HAROLD A. SEERING,
Attorneys for Defendant.

[Endorsed]: Filed Oct. 26, 1932. A. A. LaFramboise, Clerk. [70]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL, WITH SUPERSEDEAS.

The petition of the Universal Automobile Insurance Company, a corporation, defendant in the above entitled cause, for an appeal from the final judgment, is hereby granted and the appeal is allowed; and upon petitioner filing a bond in the sum of $9000.00 with sufficient sureties, and conditioned as required by law, the same shall operate as a supersedeas of the judgment made and entered in the above cause, and shall suspend and stay all further proceedings in this Court until the termination of said appeal by the Circuit Court of Appeals of the Ninth Circuit.

Dated this 27th day of October, 1932.

J. STANLEY WEBSTER,
District Judge.

[Endorsed]: Filed Oct. 27, 1932. A. A. LaFramboise, Clerk. [71]

[Title of Court and Cause.]

SUPERSEDEAS AND COST BOND.

KNOW ALL MEN BY THESE PRESENTS:

That we, UNIVERSAL AUTOMOBILE INSURANCE COMPANY, a corporation, as principal, and UNION INDEMNITY COMPANY, a corporation of the State of Louisiana, and duly authorized to write surety bonds in the State of Wash-

ington, as Surety, are held and firmly bound unto Frank Noel, appellee in the above entitled action, in the full and just sum of Nine Thousand Dollars ($9,000.00) to be paid to the said appellee, his heirs, executors, administrators, successors or assigns, to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally by these presents.

SEALED with our seals and dated this 3 day of November, 1932.

WHEREAS, lately at the May term of the United States District Court in and for the Eastern District of Washington, Southern Division, holding Court at Yakima, Washington, in a suit depending in said Court between Frank Noel, plaintiff and Universal Automobile Insurance Company, a corporation, defendant, a judgment was rendered against the said defendant at the said term of Court and the said defendant [72] has petitioned for and been allowed by the Judge of said Court an appeal to the United States Circuit Court of Appeals of the Ninth Circuit, and citation has been issued directed to said Frank Noel, as appellee, citing him to appear in the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty (30) days from and after the date of such citation;

NOW, THE CONDITION OF THE ABOVE OBLIGATION is such that if the said Universal Automobile Insurance Company, a corporation,

shall prosecute said appeal to effect, and answer all damages and costs if it fails to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

UNIVERSAL AUTOMOBILE
INSURANCE COMPANY,
By WM. H. MARKS,
Attorney in Fact,
Principal.

UNION INDEMNITY COMPANY,
By W. E. HANEY,
W. H. HANEY,
Attorney-in-Fact,
Surety.

Countersigned:

.....

Resident Agent.

The within and foregoing bond is approved this 10th day of November, 1932.

J. STANLEY WEBSTER,
Judge of the United States District Court for the Eastern District of Washington, Southern Division. [73]

State of California,
City and County of San Francisco.—ss.

On this 3 day of November, in the year One Thousand Nine Hundred and 32, before me, Emily K. McCorry, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, per-

sonally appeared W. E. Haney, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Union Indemnity Company, a corporation organized and existing under the laws of New Orleans, La.; and acknowledged to me that he subscribed the name of said Union Indemnity Company thereto as surety and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[Seal] EMILY K. McCORRY,
Notary Public in and for the City and County of San Francisco, California.

My commission expires January 16, 1935.

[Endorsed]: Filed Nov. 12, 1932. A. A. LaFramboise, Clerk. [74]

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of the United States District Court, for the Eastern District of Washington, Southern Division:

You will please prepare and file in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, a transcript of the

records of your office pertaining to the above entitled cause, including the following:

Original summons and complaint;

Petition for removal to United States District Court for the Eastern District of Washington, Southern Division;

Bond in support of petition for removal of cause from the Superior Court to the United States District Court;

Notice of filing petition for removal from the Superior Court of Yakima County, Washington, to the United States District Court, together with proof of service thereof;

Order for removal of cause from Superior Court to the United States District Court;

Notice of removal of cause from Superior Court to the United States District Court, together with proof of service thereof;

Amended answer of defendant filed in said cause in the United States District Court, Eastern District of Washington, Southern Division;

Reply to defendant's amended answer;

Exhibits "A," "B," and "C" (note: original exhibits to be sent up, consisting of 3 insurance policies);

Verdict of the jury rendered in said action;

Judgment on the verdict of the jury rendered in said action;

Petition for extension of time in which to serve proposed bill of exceptions;

Order granting extension of time in which to prepare and serve bill of exceptions, together with proof of service and certificate of Court;

Bill of exceptions and certificate settling same;

Motion for new trial and proof of service;

Order denying motion for new trial;

Petition for appeal; [75]

Assignment of errors;

Order allowing appeal with supersedeas;

Citation on appeal together with proof of service of same;

Supersedeas and cost bond on appeal together with proof of service of same;

Praecipe and proof of service of same.

D. V. MORTHLAND,
HAROLD A. SEERING,
Attorneys for Defendant.

Service of the foregoing Praecipe accepted and copy thereof received this 9th day of November, 1932.

SNIVELY & BOUNDS,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 10, 1932. A. A. La-Framboise, Clerk. [76]

[Title of Court and Cause.]

CITATION ON APPEAL.

The United States of America.—ss.

To Frank Noel, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal from the District Court of the United States for the Eastern District of Washington, Southern Division, in a suit wherein Universal Automobile Insurance Company, a corporation, is appellant, and you are appellee, to show cause, if any there be, why the judgment rendered against said Universal Automobile Insurance Company, a corporation, should not be corrected and why speedy justice should not be done to the parties on that behalf.

Given under my hand at the City of Spokane, in the Eastern District of Washington, this 27th day of October, 1932.

[Seal] J. STANLEY WEBSTER,
Judge of the District Court for the Eastern District of Washington, Southern Division.

Service of a copy of the foregoing citation is acknowledged this 28th day of October, 1932.

SNIVELY & BOUNDS,
Counsel for Appellee.

[Endorsed]: Filed Oct. 27, 1932. A. A. LaFramboise, Clerk.

[Title of Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
Eastern District of Washington.—ss.

I, A. A. LaFramboise, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages, numbered 1 to 76 inclusive, to be a full, true, correct and complete copy of so much of the record, papers and all other proceedings in the above entitled cause as are necessary to the hearing of the appeal therein, in the United States Circuit Court of Appeals, as called for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the judgment of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I do further certify that I hereto attach and herewith transmit the original citation issued in this cause.

I do further certify that the fees of the clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of $21.20 and that the same have been paid in full by Mr. D. V. Morthland, attorney for defendant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Yakima, in said District, on this 17th day of November, A. D. 1932.

[Seal] A. A. LaFRAMBOISE,
Clerk,
By MARGARET E. BAILEY,
Deputy Clerk.

[Endorsed]: No. 7009. United States Circuit Court of Appeals for the Ninth Circuit. Universal Automobile Insurance Company, a Corporation, Appellant, vs. Frank Noel, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

Filed November 19, 1932.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

7009

UNITED STATES CIRCUIT COURT OF APPEALS

NINTH CIRCUIT

UNIVERSAL AUTOMOBILE INSURANCE COMPANY, a corporation,

Appellant,

vs.

FRANK NOEL,

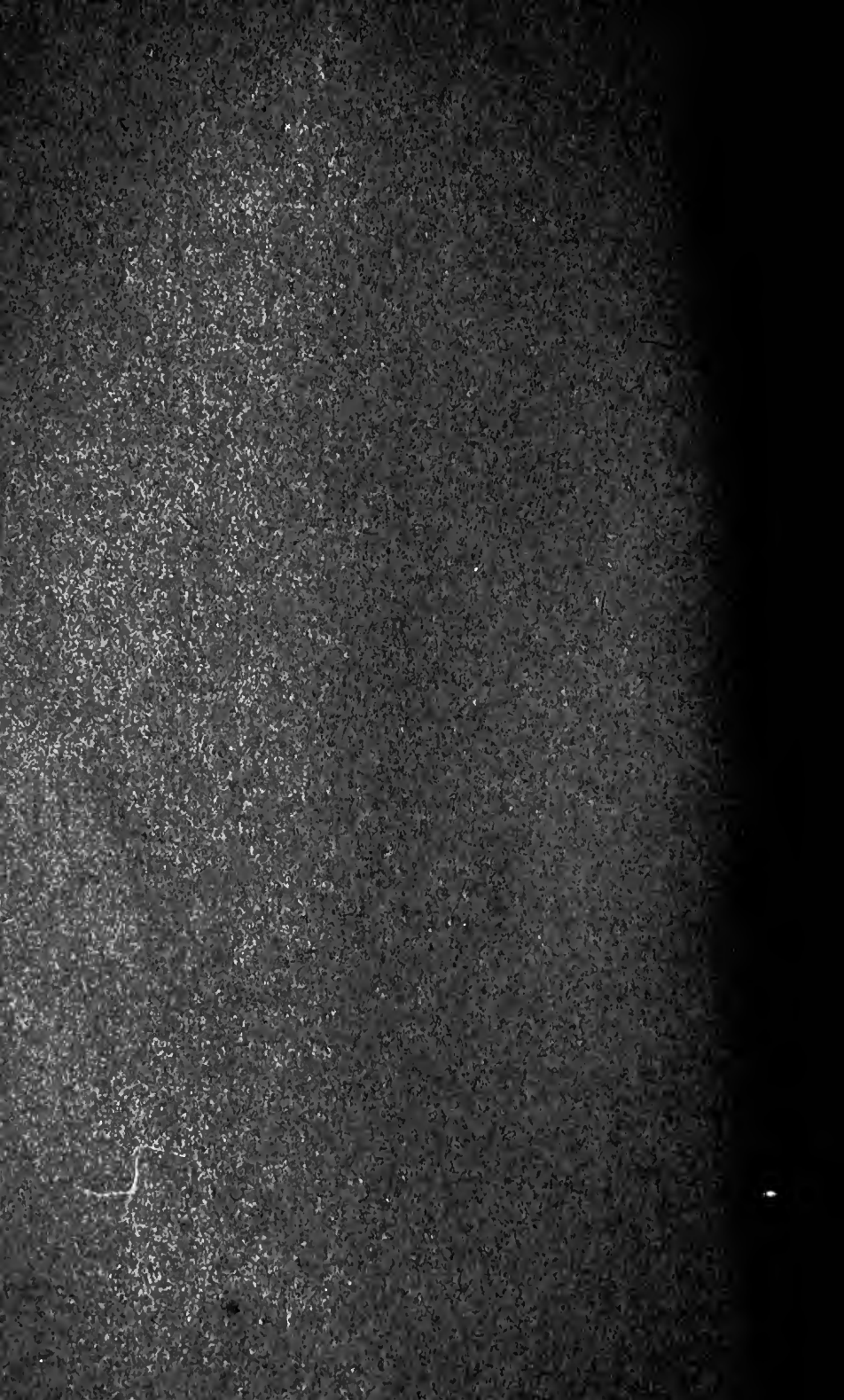
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

Appellant's Brief

D. V. MORTHLAND, Yakima, Wash.
HAROLD A. SEERING, Seattle, Wash.
WHITTEMORE & TRUSCOTT, Seattle, Wash.
W. J. TRUSCOTT (of counsel), Seattle, Wash.
Attorneys for Appellant.

MARTIN & DICKSON, PRINTERS



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UNITED STATES
CIRCUIT COURT OF APPEALS

NINTH CIRCUIT

UNIVERSAL AUTOMOBILE INSURANCE COMPANY,
a corporation,

Appellant,

vs.

FRANK NOEL,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

Appellant's Brief

STATEMENT OF THE CASE

This case arises out of a curious accident resulting in the damage of three large automobile trucks which had been used in road building in the mountainous "John Day" country in Eastern Oregon. Appellant corporation had issued an insurance policy on each of the trucks and the controversy arises out of the construction of the provisions of the policy with reference to towing. The Appellee is the owner of the claim by assignment from his son, John Noel.

In the summer of 1930, John Noel had a sub-contract under which he used the three trucks in question, on a road building job in a remote section of Eastern Oregon widely known as the "John Day country." (Transcript, pp. 53-56-58.) They had been purchased at various times and were 1926 and 1927 model 52 White Trucks. They had been used on rock and dirt hauling in connection with road building in 1927 to 1930. (Trans. p. 52.) The work closed in Oregon on November 18th, 1930, when one J. R. Hickey, an employee of John Noel, packed them alongside the camp and raised the beds and jacked up the trucks to protect same from damage from the deep snow. (Trans. p. 56.) The trucks remained in this place until the early part of June, 1931, when the owner and his employes went from Yakima into Oregon to bring the trucks and a so-called "steam-shovel" out of that country. (Trans. p. 53.)

Insurance policies were issued on behalf of Appellant on these trucks as of the date of June 1, 1931. All policies are of the same form and the original policies are attached to the transcript and marked Exhibits "A," "B" and "C."

The work of bringing out the equipment above described started about June 16th to 18th, 1931. On

June 26th occurred the events resulting in this case.

The trucks were equipped with hooks in front and rear to which cables or chains might be attached for pulling or towing. They were also equipped with beds for hauling rock, dirt or gravel which was their usual and intended use. (Trans. pp. 52-53.)

In bringing out the equipment under the personal direction of John Noel it had been part of the procedure on slippery or narrow places to fasten the trucks together with cables and chains and these in turn were fastened to the "steam-shovel." While each truck and the shovel moved under its own power, the shovel had been slipping when they were bringing it out as there had been a good deal of rain. (Trans. p. 67.) It was found necessary to have the trucks hooked on ahead to help in case anything happened. The trucks had not actually pulled the shovel. The trucks were cabled together for trouble and to use precaution for moving up the big hill. They were trying safety first. It was a narrow road and if one truck went down a little then the other trucks would have held it on. If the shovel slipped down over the bank they expected to hold it and if one truck slipped down one side would expect the other trucks to hold it. There had been some trouble with the gears slipping

in the shovel a few days before at which time some new links had been put in. (Testimony of John Noel, Trans. pp. 65-66-67.)

With the shovel in this condition the equipment started on June 26th to climb a long, steep hill. The road was narrow and on a steep grade rising at the rate of 2,000 feet in five miles of continuous grade. It was built upon the side of a mountain and was probably ten feet wide with the outer edge cleared up where rocks were filled in. (Trans. pp. 60-61.)

Mr. Noel testified that prior to the accident the trucks were fastened together with chains or cables. The lead truck was fastened to the second truck with a long twisted cable. The front and rear trucks hooked up were 30 to 40 feet apart. These trucks had hooks at each end for towing. They are put in front and rear for pulling when one truck is stuck. They had a cable between the first and second truck when we started out that morning and a big chain between the second and third trucks was fastened to the trucks by means of hooks. And between the third truck and shovel he had a big heavy log chain. And when they started up the grade that morning the equipment was fastened together in the manner just described and they continued to have them fastened together in that

manner until they got to the place where they had difficulty in getting around a rocky corner and stopped, near the place where the upset occurred. (Trans. pp. 64-65.)

In going around this rocky corner a rod had become bent. At the same time magneto trouble developed in the motor of the front truck. During all this time the motors on the other two trucks and on the shovel were left running.

Besides the owner, John Noel, there were five employes with the outfit, to-wit, three truck drivers, the shovel-runner and the oiler. (Trans. pp. 58-59-60-70-71.) There was also present C. A. Case, a driver for the Shell Oil Co., who was watching the efforts to move the equipment around the corner. (Trans. p. 58.)

After thus working on the machines for a time some of the men were sent back for repairs. The shovel-runner and Mr. Case went back to Case's truck, which was not in sight of the equipment. Noel walked up the hill a few hundred feet, also out of sight of the trucks. One man was working on the front truck magneto. Noel was gone five or six minutes and when he walked back down the road the whole outfit had gone over the bank. (Trans. pp. 65-66-67.)

Aside from the evidence of C. A. Case (Trans. p. 58) the only evidence of what happened is contained in Mr. Noel's testimony quoted above at length and that of Joe Brinier. (Trans. pp. 70-71-72.)

From the evidence it appears that at the time the three trucks and the shovel went over the brink the cable between the first and second trucks had come unfastened and that the shovel was unhooked from the third truck. (Trans. pp. 65-69-72-73.) The witness Case says, however, that the shovel was chained to the last truck when he left the scene to go back to his truck. (Trans. p. 64.) And it further appears that the second and third trucks were still fastened together by a big heavy log chain. (Trans. p. 65, line 6.)

The remains of the trucks were left at the bottom of the canyon and suit was commenced for the recovery of the face value of the policies $4,000 each.

Under the term "Exclusions," each policy provides (Exhibits "A," "B" and "C"):

> "F. Unless otherwise provided by agreement in writing added hereto, the Company shall not be liable:
>
> * * *
>
> (2) Under Section 2, nor under item 4 of Section 1 of the Schedule of Perils, for any loss, damage or expense while the automobile insured hereunder is operated, maintained or used * * *

or (c) for towing or propelling any trailer or vehicle (incidental assistance to a stranded automobile on the road is permitted)."

Appellant by its first affirmative defense, (Trans. p. 16) alleged that no agreement permitting towing was ever made and that the damage, if any, was caused by the towing of the trucks and shovel in violation of the foregoing exclusion. (Trans. pp. 17-18.)

Upon the foregoing facts the trial court upon motion refused to submit the question of towing to the jury upon which Appellant properly noted an exception.

The jury returned a verdict of $7,500.00 for the three trucks.

SPECIFICATION OF ERRORS

(1) The court erred in granting Appellee's Motion at the conclusion of all the evidence in the case to withdraw from the consideration of the jury the evidence offered in support of appellant's first affirmative defense, to-wit: that the trucks and shovel were being towed within the provisions and meaning of the insurance policies admitted as evidence in the case and marked Exhibits "A," "B," and "C."

ARGUMENT

It is Appellant's contention that the facts as set forth above disclose that the insured trucks at the time of the loss were engaged in towing, and that therefore the loss is excluded by the policy provision above set forth.

The purpose of fastening the trucks to each other and the third truck to the shovel was that each might aid the other and aid in the event of possible mishap. The purpose was not solely to pull the shovel, but in the event any one of the vehicles went off that the others might aid it. As Noel testified "for trouble and to use precaution for moving up the big hill." "Were trying safety first." "It was a narrow road and if one truck went down a little, then the other trucks would have held it on." "If the shovel slipped down over the bank, they expected to hold it and if one truck slipped down one side * * * would expect the other trucks to hold it." (Witness Noel, Trans. p. 65.)

The trucks are clearly within the policy exclusion which covers "trailers," or "vehicles." That the shovel was a vehicle within the meaning of the policy, there can be no doubt. It was the familiar shovel boom and engine mounted upon a caterpillar tractor.

The word "vehicle" is defined in Washington as follows:

> (a) Vehicle—"Every device in, upon or by which any person or property is, or may be transported or drawn upon a public highway, excepting devices moved by muscular power or used exclusively upon stationary rails or tracks." Washington Session Laws 1929, Chapter 180, Section 1 (a).

In Oregon:

> "5. The term 'vehicle' shall mean every mechanical device moved by any other power than human power over the highways of the State, excepting only such as moves exclusively on stationary rail tracks." 55-101 Oregon Annotated Code.

The policy was written in Washington; the loss occurred in Oregon. The statutory definition of vehicle in each state clearly covers the device herein called "shovel" or "steam-shovel."

At the trial, the Appellee contended that inasmuch as the evidence disclosed that each vehicle was operating under its own power and that they were chained and cabled together, simply in case of an emergency, there was no towing. The trial court took this position when it granted the Motion taking the case from the jury.

It is to be observed that the policy provision in this case excludes coverage while the insured vehicle is "operated, maintained, or used" * * * "for towing or propelling any trailer or vehicle." Under this language, it is not necessary that the trucks be actually engaged in pulling another vehicle at the time of the loss. The word "maintained" is defined as follows in Webster's New International Dictionary:

> "To hold or keep in any partciular state or condition, especially in a state of efficiency or validity."

The court's ruling in effect restricts the force of this provision to cases where vehicles are actually moving and pulling another vehicle. This is an unwarranted restriction of the meaning of the language used in the policy. If there is a hazard in connection with towing, and the cases hereinafter cited all agree that there is, why is that hazard not present under the facts in this case?

Here we have four vehicles proceeding up a steep mountain grade, chained and cabled together. When the owner and his employees left the vehicles in question standing on the steep, narrow grade, the motor of the shovel and the motors of at least two of the trucks were left running. (Witness Case, Trans. p. 60; Witness Noel, Trans. p. 67.) Those vehicles so

chained together are each made dependent on the vagaries of the other. This is a risk which is not an ordinary incident to the operation of a truck, and is clearly contemplated in the policy provision. While no one is able to explain just what happened, it is a fair inference that the running motors, left as they were, constituted prime factors in causing the whole outfit to go over the edge and down the mountainside. The hazard was just as great then and there as if the vehicles were actually in motion. To accede to Appellee's contention means that we have a situation where the policies are in force one instant when the cables are slack and the next instant coverage is excluded because the cables and chains are taut. This use of the truck was not usual or customary, and the very recital of the reasons why the cables and chains were used shows the extreme increase in hazard to which the trucks were subjected.

So far as a diligent search discloses, precedents covering the situation are few. In all of the cases where the question has been presented, however, the court has given full effect to this provision, and has held that the loss need not have been the proximate result of the act of towing.

Coolidge v. Standard Accident Insurance Co., ... Cal. App. ....., 300 Pac. 885;

Conner v. Union Automobile Insurance Co., ... Cal. App. ....., 9 Pac. (2d) 863;

Maryland Casualty Co. v. Adams (Miss.) 131 Southern Reporter 544;

Adams v. Maryland Casualty Co. (Miss.) 139 Southern Reporter 453.

In the *Coolidge* case, supra, it was claimed this exemption clause was waived by failure to plead in the answer of the Insurance Company that the presence of the attached trailer contributed to the cause of the accident. The court said:

> "It was not necessary to make these allegations. The defendant's exemption from liability does not depend upon the attached trailer becoming the cause of the accident or even contributing to the casualty. The very fact that the trailer was being towed at the time of the accident relieved the defendant from liability according to the specific terms of the insurance policy. The Company was entitled to protect itself against this added hazard. The unambiguous terms of the policy did exempt the Company from liability while the automobile was towing a trailer."

It is manifest that if the casualty feared by Mr. Noel has occurred viz. If one of the trucks had slipped off the road while the cavalcade was moving, the exemption would have applied, within the doctrine of the *Coolidge* case.

In the case of *Conner v. Union Automobile Insurance Co., supra,* the court said:

> "The attachment of a trailer to the automobile while it was being operated is clearly an added hazard. There appears to be good reason why an insurance company may lawfully limit its liability to the operation of the insured machine free from the use of an attached trailer, which increases the hazard. An automobile is not ordinarily used with a trailer. It is reasonable to expect the owner of a machine, who desires to obtain insurance for his automobile with a trailer attached, to so inform the insurer."

In the case of *Maryland Casualty Company v. Adams, supra,* the complaint alleged that one Falls, the insured under the policy, was driving his truck with a trailer attached; that he traveled onto the wrong side of the road, and the front end of his truck struck the car which was being cranked by the injured Adams. The trial court overruled a demurrer to the complaint. It was contended in that case that the act of towing a trailer had no proximate connection with the injury, but this contention was overruled and the demurrer was sustained upon the grounds that the towing exclusion was perfectly valid and it was apparent that the operation of a truck with a trailer attached containing logs was more hazardous than the operation of the truck without the trailer attached. The latter portion of the Opinion seems to indicate at least by implication that the court is applying the test that the act of towing must be a proximate cause of

the injury. In the subsequent case of *Adams v. Maryland Casualty Co., supra,* an action brought on behalf of the minor son of the injured in the case just discussed, the complaint was amended to allege that the trailer was not loaded with logs, and that the truck was being operated with sufficient speed to knock the car in which the plaintiff was riding off the road without creating any slack between the trailer and truck. The court held, however, that these amendments made no difference and that the demurrer should be sustained. In the course of its opinion, the court said:

> "It will be seen from an analysis of the provisions of the policy that the Insurance Company did not assume to insure the risk caused by the operation of the truck with the trailer attached, unless it was permitted by notation on the policy, and the proper charges made for such coverage.
>
> We do not see how the averments set forth in this declaration aid the plaintiff in the suit because the Casualty Company did not assume to insure against injuries in the operation of the truck with the trailer attached."

The language of the court in the latter case seems to indicate clearly that it is the act of attaching a trailer, or other vehicle, which is intended to be excluded by the Insurer.

The contention that each vehicle was operating under its own power is beside the point. The test is as

applied by the court in the cases above—it is the operation of a vehicle with another vehicle attached which is excluded, and the striking manner of the loss in this case demonstrates that the exclusion was reasonable. Under the facts of this most unusual accident, Appellant earnestly contends that the question of whether the trucks were "operated, maintained or used" for towing, was a question of fact and the court erred in not submitting it to the jury. That for this reason the case should be reversed and Appellant granted a new trial.

Respectfully submitted,

D. V. Morthland, Yakima, Wash.
Harold A. Seering, Seattle, Wash.
Whittemore & Truscott
W. J. Truscott, (of counsel)
Seattle, Wash.

IN THE

Circuit Court of Appeals of the United States

FOR THE NINTH CIRCUIT

UNIVERSAL AUTOMOBILE INSURANCE COMPANY, a corporation,

Appellant,

vs.

FRANK NOEL,

Appellee,

No. 7009

BRIEF OF APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE J. STANLEY WEBSTER, *Judge*

SNIVELY & BOUNDS
I. J. BOUNDS
ROBERT J. WILLIS
Attorneys for Appellee,

Ward Building,
Yakima, Washington.

IN THE

Circuit Court of Appeals of the United States

FOR THE NINTH CIRCUIT

UNIVERSAL AUTOMOBILE INSURANCE COMPANY, a corporation,	*Appellant,*	No. 7009
VS.		
FRANK NOEL,	*Appellee,*	

BRIEF OF APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE J. STANLEY WEBSTER, *Judge*

SNIVELY & BOUNDS
I. J. BOUNDS
ROBERT J. WILLIS
Attorneys for Appellee,

Ward Building,
Yakima, Washington.

SUBJECT INDEX

TABLE OF CASES

TEXTBOOKS AND STATUTES CITED

STATEMENT OF THE CASE

On the morning of June 26, 1931, which was the day upon which the loss, which is the basis of this action, occurred, the three trucks and the steam shovel had reached a point along the route at the foot of a long narrow mountainous grade on the John-Day Highway. At this point, and for the first time, the three trucks were connected with wire cables and the steam shovel connected to the rear truck with a log chain. The distance between each truck and between the rear truck and the steam shovel was some 25 or 30 feet. After so connecting the three trucks and steam shovel, they all started up this grade and had proceeded from two hundred to three hundred feet when the steering rod on the steam shovel became so bent that the same could not be operated and at the same time the magneto on the lead truck developed trouble which required immediate attention. Whereupon, the three trucks and the steam shovel were stopped and the chains and cables between the three trucks and between the rear truck and the steam shovel were unfastened and remained so at all times thereafter.

The undisputed testimony was that all of the trucks as well as the steam shovel traveled on their own power at all times; that none of the trucks gave assistance to the other, nor did any of the trucks assist or aid

the steam shovel in any way. The steam shovel was geared much lower than the three trucks and the three trucks would proceed until they had taken the slack out of the cables and the chain, and by a system of hand signals would stop until the steam shovel got up to the rear truck when they would again proceed.

The undisputed testimony in the record was that it would be impossible for the trucks to have assisted the steam shovel in any way, due both to the difference in the gearing, as well as to the fact that the road along which they were traveling was very crooked and an attempt by the trucks to put pressure on the steam shovel would oblige the trucks to pull one against the other. Furthermore, the steam shovel was many tons heavier than the combined weight of the three trucks.

The defendant's own witnesses, and all of them, testified that there was no towing at any time, all of the trucks, and the steam shovel, being on their own power. Further, that the trucks and the shovel had been placed where this accident happened for some 35 or 45 minutes, during which time, there was no attempt to move any of the trucks or the steam shovel, and it was while they were so stopped, that the accident in question took place.

This grade upon which they were stopped, was very steep, very narrow, and very crooked. It appears that one of the mechanics, witness for the defendant, was working on the magneto under the hood of the leading truck when the brake on the same became unfastened, permitting the lead truck to go down the grade and evidently coming in contact with the second truck, and the second truck in turn with the third truck, all three going over the grade and down into a canyon some two to three hundred feet deep.

It also appears from the defendant's evidence, that this dirt and gravel road was quite moist and as the trucks came together the side of the road gave way and the road in giving away permitted the steam shovel to tip over partly on the road and partly off. The steam shovel remained in this position for several minutes and then later the shovel also went over the precipice into the canyon, indicating conclusively that the trucks were not fastened to the steam shovel, otherwise they would have all gone over together. It is true that the witness Case, for the defendant, testified that all of the trucks were fastened together after they had come to the stop. Upon cross examination, Case testified that he did not go up to the trucks, and did not go beyond the steam shovel, whereupon the court struck all of the testimony of the witness Case from the record, respecting the fastening of the trucks together. Quoting the testimony of C. A. Case:

"There were some one working under the steam shovel. There was a cable or chain between the steam shovel and the three trucks and the trucks next to them. It was fastened when witness noticed. It had to be unfastened so that the workmen could get under the shovel and it was fastened again. Witness did not go beyond the shovel. The three trucks were in front of the shovel. Witness did not know what was between them in looking up, but was guessing. Witness did not see the chains or cables between the trucks and did not go by the back truck or by the shovel." (Trans. p. 62)

"Upon motion testimony of witness was stricken except as in so far that witness testified he saw the log chain fastened from the third truck to the steam shovel which followed. With that exception the testimony of witness with respect to the manner they were fastened, the towing or fastening is stricken from your consideration." (Trans. p. 62)

Again, quoting from the testimony of the same witness:

"Witness traveled over the road after the accident occurred about an hour or an hour and a quarter later. The side or part of the road where the trucks had gone over had broken off about the width of the tread of the equipment. (Trans. p. 63)

Quoting from testimony of John Noel:

"The shovel and tractor weighed about 42 to 45 tons." (Trans. p. 66)

Witness Noel was shown a purported statement made by himself to the adjuster for the insurance

company while the agent was putting on a party in the Franklin Hotel in Seattle and during which party considerable liquor had been consumed and along about six or seven o'clock in the morning a statement was signed. This statement was shown to the witness Noel, by counsel for the insurance company during the trial and a great part of the statement was directly repudiated by the said witness Noel. The statement was never offered in evidence, nor was the insurance adjuster called to the stand although present in court. (Trans. p.p. 66, 67, 69).

It also appeared in the record, that the occasion of hooking the trucks and steam shovel together was purely a precautionary method, so that if anything went wrong with the shovel while traveling this particular part of the road the trucks would hold it in place until the same was blocked, it being the testimony that the steam shovel had no brakes.

Joe Brinier testified that he, personally, took the chain off between the last truck and the steam shovel, and threw it over to the side of the road; and, he was corroborated in this by John Noel. These witnesses also testified that they saw the chain over on the side of the road after the accident. (Trans. p. 73)

The trial court granted the appellee's motion to withdraw the defense of towing from the considera-

tion of the jury, and it was the action of the court upon this sole point that is assigned as error.

ARGUMENT

I

THE INSURED TRUCKS WERE NOT TOWING OR PROPELLING ANY TRAILER OR VEHICLE.

The only point this Court is to determine on this appeal is whether or not any substantial evidence was presented to the effect that the trucks were being "operated, maintained or used for towing or propelling any vehicle."

There is no dispute in the record but that the three truck and the shovel were at all times proceeding under their own power. In holding against the appellant on this question, the trial court took the position that the words "towing" and "propelling", as used in the exclusion clause of the policies necessarily included the idea that it was a pulling of one vehicle by another or that the towing or propelling vehicle furnished motive power in the transportation of the towed or propelled vehicle.

The reason for the Trial Court's ruling, is best explained by quoting its own language, which was as follows:

"Now the testimony you introduced here on your own witnesses shows that * * * what actually happened was that these trucks and this steam shovel, each on its own power, were proceeding up this hill; that these cars while fastened together were not towing and that they were using hand signals to keep the slack in the tow line * * *. * * *and your own witnesses testified that they were not propelled, that the anchor cables were put on to prevent in case of emergency the steam shovel getting over that bank, and your own testimony shows that it didn't tow and it didn't propel * * *. * * * the testimony of each witness that testified upon the subject has been to the effect that none of these automobiles or any more than one, ever at any time propelled that steam shovel. * * * * did not tow the steam shovel or were not fastened together with that intention or for that purpose and some of the witnesses testified that these automobiles couldn't have towed that steam shovel, that each automobile was on its own power is the testimony of the witnesses and that one was not pulling or had not pulled the other * * * and that a system of signals was used when the automobiles would tighten or pull, it being the intention of the parties that in the event of emergency in this hilly pass or the machinery getting off the road and having no blocks itself, could anchor or hold it, and as I recall the testimony there is no testimony where these automobiles towed the steam shovel or they were being used or maintained for the purpose of towing. Under those circumstances I can hardly see how I can submit this question to the Jury. * * * Defendant's own witnesses who have testified upon the point testified in the affirmative that they did not tow and did not intend to tow and that the cars were not used for towing, intended to be used for towing and I do not see * * *." (S. F. 68, 69, 70 and 71)

It is the contention of the appellee that the term "towing" necessarily includes the idea that the one vehicle is drawing another, the one in the lead furnishing the motive power. We have not discovered a case where the term "towing" is legally defined, but the following decisions all indicate that the definition as we have stated it above, is the correct meaning of the term. In the following cases, the word was used as follows: (The italics in each quotation are ours.)

Baker v. Rosaia, 165 Wash. 532; 5 Pac. 2nd, 1019 (at p. 533)

> "At about 10:30 o'clock in the forenoon of the day of the accident, Frank Rosaia and Fred Rosaia, * * * by means of a Lincoln Sedan automobile, *were towing* a Ford touring car in a northerly direction on Fourth Avenue. Frank was in the Lincoln sedan and Fred was at the steering wheel of the Ford. The distance between the two cars was about 10½ feet. The tow line consisted of a steel cable approximately 3-5 of an inch in diameter, * * *"

Farrar v. Whipple (Cal.) 223 Pac. 80:

> "The defendant Gielow was operating his automobile on the same highway in the opposite direction, and at the time of the collision hereinafter referred to was *towing an automobile* owned and steered by the defendant Whipple."

Honeywell v. Mikelson, 144 Wash. 513, 258 Pac. 36 (at page 514):

"The Willys-Knight car was fastened to the wrecking car in the usual method by picking up the front end with a derrick, and the Dodge car was fastened on behind the Willys-Knight car with a rope. The Japanese was placed inside the Dodge car to steer it, and thus connected, appellant proceeded to *tow them* to Everett."

P. 515:

"Instead of making two trips *for the towing of the two cars*, they preferred *to attempt to tow them both together.*"

Walcott v. Renault Selling Branch, Inc. 162 N. Y. S., 496, at page 497:

"* * * It (the accident) resulted from the attempt of the deceased to pass between the two vehicles belonging to the defendant, *one of which was being towed by another.* The deceased tripped over the tow line and was thrown violently to the ground, receiving injuries, either from the fall or from being hit by one of the vehicles, which resulted in his death. Both of the vehicles were automobiles. *Only the front one, however, was running by its own power; the rear one being towed by it.*"

Glasgow v. Dorn (Mo. App.) 220 S. W. 509, at page 510:

"* * * notwithstanding the truck was without brakes, defendant's agent *proceeded to tow the car* eastwardly on Washington Avenue for the purpose of reaching the defendant's garage. * * * when the automobiles, *one being towed by the other*, * * *."

Rapetti v. Peugeot Auto Import. Co., 162 N. Y. S. 133:

> "* * * After taking a step or two, both men tripped and fell, and plaintiff severely sprained both wrists. On getting up, plaintiff found that he had tripped over a tow rope, some 18 inches above the sidewalk, *which was attached to the first automobile and was being used to tow the second machine.*"

Canfield v. N. Y. Transp. Co. 112 N. Y. S. 854, at page 855:

> "When the automobile looses its motive power, it must be moved by the application of some outside power. The ordinary and common way is by attaching it to another vehicle *and towing it to the garage.*"

Trudell v. James Cape & Sons Co. (Wis.) 202 N. W. 696:

> "The plaintiff Walter J. Trudell, with his wife sitting in the front seat with him in a Buick car, *were towing two cars in the rear of the Buick* from Chicago to Milwaukee, * * * Floyd Trudell was in the Ford car, steering it, and Russell Trudell was in the Briscoe car, steering it."

The act of drawing one automobile along behind another was also referred to as "towing" in the following cases:

Clayton v. Kansas City Ry. Co., (K. C. App.) 231 S. W. 68;

Jerome v. Hawley, 131 N. Y. S. 897;

Richter v. Dahlman & Inbush Co., (Wis.) 190 N. W. 841;

Steinberger v. California Electric Garage Co., (Cal.) 168 Pac. 570;

Cowley v. Bolander, (Ohio) 166 N. E. 677;

Beaumont v. Beaver Valley Traction Co., (Pa.) 148 Atl. 87;

Broussard v. Teche Trans. Co. (La. App.) 132 So. 136;

Webster's New International Dictionary, 1930 edition, defines the word "towing" as follows:

> "To drag or take along with one. 2. To draw or pull along after, especially through the water by a rope or chain; as, a towboat tows a ship. 3. Act of towing or state of being towed;—chiefly in the phrases to take in tow, that is, to tow, and to take a tow, that is, to avail one's self of towing."

And, in fact, the cases cited in appellant's brief sustain the proposition which we are here making that the term "towing" means the drawing of one vehicle by another, the latter furnishing the motive power.

In *Coolidge v. Standard Accident Insurance Company*, 300 Pac. 885, at page 887, the Court said:

> "The evidence is uncontradicted to the effect that the accident occurred while the plaintiff was driving along the highway in his automobile *to*

> *which a trailer loaded with sheep was attached. The towing of the trailer was in direct contravention of the specific terms of the policy* * * the policy provided that the company shall not be liable for accidents occurring while the automobile was 'used for towing or propelling trailers or other vehicles used as trailers.' Liability for this accident is therefore specifically exempted by the terms of the policy."

In *Conner v. Union Automobile Insurance Company*, 9 Pac. 2d 863, at page 864, the court said:

> "The insured *machine was towing a trailer at the time the accident occurred.*"

The word "propel" is defined in Webster's New International Dictionary, 1930 Edition, as follows:

> "To drive forth or out. To impel forward or onward by applied force; to drive; push;"

and, by Funk and Wagnalls New Standard Dictionary, 1932 Edition, as follows:

> "To drive or urge forward; force onward; cause to move on; especially, to serve as a means of propulsion for (a vehicle, vessel, airplane, etc.)"

It is familiar rule of law, as stated in 13 C. J., at page 531, that "in construing a written contract, the words employed will be given their ordinary and popularly accepted meaning in the absence of anything to show that they were used in a different sense." There can be no doubt in the Court's mind but that the words

"towing" and "propelling" have an ordinary and popularly accepted meaning in general use, which is the furnishing of motive power by one vehicle, machine or conveyance for the drawing or pushing of another vehicle, machine or conveyance. There is nothing in this case to indicate that the words were used or intended in any sense other than this popularly understood meaning.

From the foregoing, it will be seen that at the time of the accident none of the trucks were being used for "towing or propelling any trailer or vehicle"; and that, therefore, consideration of appellant's first affirmative defense was properly withdrawn from the jury.

The cases cited by appellant in its brief are not in point. The quotations above given from the Coolidge and Conner cases demonstrate that in each, the insured automobile, at the time of the accident, was towing an attached trailer.

In the cases of *Maryland Casualty Co. v. Adams* (Miss.) 131 Southern Reporter 544 and *Adams v. Maryland Casualty Co.* (Miss.) 139 Southern Reporter 453, the actions arose out of the same accident, and were based upon the same facts. The following quotation from the latter case, to wit: "This truck was being operated on the highway with a trailer

attached," shows that the insured machine was towing in violation of the terms of the policy.

It is thus clearly demonstrated that in each of the four cases cited by appellant there was no controversy as to whether or not the insured automobiles were engaged in towing, that point being admitted in each instance. Inasmuch as the point decided by the lower court in the case at bar was that the insured trucks under the undisputed evidence, were not being "operated, maintained or used for towing or propelling any trailer or vehicle," the cited cases can be of no help to the court, and no comfort to the appellant.

Appellant attempts to make some point by an alleged argument that the exemption clause in the policy was effective not only when the trucks were "operated or used" for towing or propelling, but also while they were "maintained" for such purpose. We will admit that there is a distinction between these terms, but we are at a loss to know why the appellant has pointed out this distinction, attempting to defeat recovery thereon. There is no more evidence in the record that the trucks were used for towing at any other time, or that they were maintained for that purpose, than there is that they were towing at the time of the accident.

II

THE STEAM SHOVEL DID NOT CONSTITUTE A "VEHICLE," WITHIN THE TERMS OF THE POLICIES

Although the decision of the trial court was evidently based on the holding that the insured trucks were not "towing" or "propelling," the court nevertheless raised a further question when, after reading the provisions of the exclusion clause in the policy he said:

> "Now this steam shovel isn't a trailer; is it a vehicle?" (S. F. 67).

It is the contention of the appellee that the steam shovel was not, and is not, a "vehicle" within the meaning of the policy.

In U. S. Compiled Statutes, 1901, page 4, the following definition is given:

> "The word 'vehicle' includes every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land."

In *Davis v. Petrinovich* (Ala.) 21 S. 344, the court said:

> "A vehicle is any carriage moving on land, either on wheels or runners; a conveyance; that which is used as an instrument of conveyance, transportation or communication."

Bouvier's Law Dictionary defines the word as follows:

> "The term 'vehicle' includes every description of carriage or other vehicle or contrivance used or capable of being used as a means of transportation on land."

Sub-section (6) of Oregon Code, Section 55-101, following the definition of "vehicle," which is quoted on page 9 of appellant's brief, gives the following definition:

> "The term 'motor vehicles' shall mean every self-propelled vehicle moving over the highways of this State * * *"

Sub-section (b) of Section 2 of Chap. 180 of Washington Session Laws 1929, defines motor vehicles as "every vehicle, as herein defined, which is self-propelling."

It is apparent, therefore, that under the statutes of both Washington and Oregon the steam shovel in this case is defined as a "motor vehicle" rather than as a "vehicle," as there was no dispute in the record but that it was proceeding on its own power.

The definitions of "vehicle" appearing in the statutes which the appellant quoted are included in Chapters regulating the operation of vehicles on the highways; and, even if the steam shovel was held to be a vehicle within the meaning of such definition, it

would not necessarily follow that it was a "vehicle" within the meaning of the insurance policy and, it should be given its ordinary and popularly accepted meaning, which is, as demonstrated by the citations above given, "a carriage or contrivance used or capable of being used as a means of conveyance or transportation on land." The steam shovel in this case is not such a carriage or contrivance. Its use is for moving earth, dirt, sand, rocks or other things similar. Although the steam shovel itself can be moved from place to place under its own power, its purpose as such, is not that of being a means of conveyance or transportation; nor is it capable of being so used.

III

THE SCINTILLA OF EVIDENCE RULE

It is the contention of the appellee in this case that there was no substantial evidence of any kind introduced in the case to support the allegations of appellant's first affirmative defense. In this connection, we wish to call to Court's attention the well settled rule in the State of Washington that more than a mere scintilla of evidence is necessary to support a verdict, or to justify the court in submitting a case to the jury.

In *Jones v. Harris*, 122 Wash. 69, 210 Pac. 22, the court said, at page 80:

"This court early in its history discarded the scintilla of evidence doctrine and has uniformly held that a verdict to be sustained must be supported by substantial evidence."

Dunsmoor v. North Coast Transportation Co., 154 Wash. 229, 281 Pac. 995, the court, at page 231, said:

"It is incumbent upon the appellant, in order to recover against the respondent, to show that its driver was guilty of negligence. This she must show by substantial evidence—a scintilla of evidence will not do—and, in our opinion, the evidence here is not of that substantial character on which a jury is permitted to found a verdict."

To the same effect are:

Kelly v. Drumheller, 150 Wash. 185, 272 Pac. 731;

Thompson v. Virginia Mason Hospital, 152 Wash. 297, 277 Pac. 691, and

Hansen v. Continental Casualty Co., 156 Wash. 691, 287 Pac. 894.

IV

PORTION OF TESTIMONY ERRONEOUSLY ABSTRACTED

The inherent viciousness of the transcript system of transcribing the evidence from the statement of facts is ably demonstrated in the case at bar. In this regard we wish to call the Court's attention to page 66 of the transcript of record in which it is said:

"The proof was put into the insurance company in which witness made the statement that

when the trucks were pulling all three trucks were running and the shovel was also running on its own power so that they would act as an anchor in case the shovel should go backwards, or in case something should break and at the same time they would help the shovel up the grade and it would help us to make better time."

No such evidence was ever introduced in this case, no such written statement by John Noel to the insurance company, if one was in existence, was ever offered in evidence by the appellant nor was the adjuster to whom such a statement was purported to have been made, placed on the stand by the appellant to testify in regard thereto.

The testimony of Mr. John Noel, as shown by the statement of facts, is as follows:

"Q. And you made a statement to the adjuster in connection with that?

"A. Yes.

"Q. I will ask you, did you not state to the adjuster the following, 'when the trucks were pulling all three trucks were working and the shovel was also running on its own power, so that they would act as an anchor in case the shovel would go backwards, or in case something would break, and at the same time they would help the shovel up the grade and it would help us make better time?' "

"A. No sir, I didn't say anything about making better time.

"Q. I will show you a typewritten statement. Is that your signature?

"A. That is my signature but I didn't make that statement."

(S. F. 45)

On cross examination of this witness, it was shown that the insurance adjuster, Mr. Wasson, was with the witness in the Benjamin Franklin Hotel in Seattle from eight o'clock on the evening previous until six or seven o'clock on the morning when the statement was signed. The testimony also showed that an all night party was held, that liquor was furnished by Mr. Wasson; and that the statement was signed by Mr. Noel about the time when the party broke up at about six or seven o'clock in the morning, when he was in an intoxicated or partially intoxicated condition. (Trans. p. p. 69 and 70).

After that evidence went into the record, the appellant chose not to offer the written statement in evidence; and did not put Mr. Wasson on the stand, although he was present in the court room throughout the trial.

Another instance of a false idea being carried into the transcript, and from there into the appellant's brief, as a result of careless abstracting, is the statement appearing on page 67 of the transcript and on page three of appellant's brief, to the effect that:

"The shovel had been slipping when they were bringing it out as they had had a good deal of rain."

There was no evidence in the record to the effect that the shovel had ever slipped except at the time of the accident when it and the three trucks went over the grade. An examination of the statement of facts discloses that the testimony which was abstracted as above quoted; was given as follows:

"Q. You spoke about the shovel slipping off the grade. As you remember, where was that?

"A. Slipped off the grade—that must have been when it was wrecked.

"Q. I understood you had a good deal of rain when you having—

"A. That was on any grade—three or four miles from the grade, this grade.

"Q. Did your shovel slip when you were bringing it out?

"A. No it just slipped * * * ." (S. F. 46)

V.

POLICY CONSTRUED AGAINST INSURER

The fastening together of the trucks, or of the trucks with any other contrivance, was not listed in the policies as a situation wherein the company's liability under the policies did not extend. It is a famil-

iar rule of law that an insurance policy will be construed most strongly against the insurer.

> *Stipcich v. Metropolitan Life Ins. Co.*, 277 U. S. 311, 72 L. Ed. 895.
>
> *Globe & Rutgers Fire Ins. Co. v. King Foong Silk Filature*, 18 Fed. 2nd 6.
>
> *Insurance Co. of North America v. Rosenberg*, 25 Fed. 2nd 635.

This rule, and the reason for it, was informally stated by the trial court in rendering its oral decision as follows:

> "This policy of insurance was written by the insurance company and it had the choice of words that it wished to employ to advise the liability which was not to be covered by this policy, and having chosen words of apt meaning, the Court is not going to write into this policy a provision broader than the company has been pleased to adopt for its own protection." (S. F. 69)

CONCLUSION

The only point urged by the appellant on this appeal is that the trial court erred in not submitting to the jury the question of whether or not the insured trucks were "operated, maintained or used for towing or propelling any trailer or vehicle."

There can be no doubt that the trucks were not being operated or used for towing or propelling a

trailer or vehicle at the time of the accident since, first, the whole caravan consisting of the three trucks and the steam shovel had been at rest in the road for some considerable time before the accident occurred; and, second, when they were proceeding up the grade, each truck and the steam shovel was traveling solely under its own power. As heretofore stated, as established by the authorities above cited, and as the trial court held as a matter of law, the trucks were not engaged in towing or propelling at the time of the accident, nor had they been maintained or used for that purpose.

Not only was there no evidence of towing or propelling, which, under the scintilla of evidence rule, is necessary in order to require a submission of the case to the jury, but there was not even a scintilla of evidence to establish towing or propelling.

While the question of towing or propelling is the important one in this case, and while we consider it decisive of this appeal, if this Court should be of the opinion that there was in fact towing or propelling, then we insist that the exception clause does not apply because of the fact that the steam shovel was not a "vehicle" within the meaning of the policy.

We therefore submit that the action of the trial court in withdrawing the case from the jury as to all matters except the question of value of the trucks, was proper; that it was not only the privilege, but the duty, of the trial court, to so act; and that the judgment of the District Court herein should be affirmed.

Respectfully submitted

SNIVELY & BOUNDS,
I. J. BOUNDS,
ROBERT J. WILLIS,
Attorneys for Appellee.

UNITED STATES
CIRCUIT COURT OF APPEALS

NINTH CIRCUIT 13

No. 7009

UNIVERSAL AUTOMOBILE INSURANCE COMPANY, a Corporation,

Appellant,

vs.

FRANK NOEL,

Appellee.

Petition for Rehearing

D. V. MORTHLAND, Yakima, Wash.,
HAROLD A. SEERING, Seattle, Wash.,
WHITTEMORE & TRUSCOTT, Seattle, Wash.,
W. J. TRUSCOTT (*of Counsel*),
Seattle, Wash.,
Attorneys for Appellant.

MARTIN & DICKSON, *Printers*

UNITED STATES CIRCUIT COURT OF APPEALS

NINTH CIRCUIT

No. 7009

UNIVERSAL AUTOMOBILE INSURANCE COMPANY, a Corporation,

Appellant,

vs.

FRANK NOEL,

Appellee.

Petition for Rehearing

To the Honorable Circuit Court of Appeals of the United States for the Ninth Circuit and to the Judges thereof:

Comes now Universal Automobile Insurance Company, a Corporation, Appellant in the above entitled cause, and presents this its Petition for a rehearing of the above entitled cause and in support thereof respectfully shows:

I.

That the construction placed by this court upon the policy provision as to "towing" is unduly restricted.

In its opinion filed hereon on April 24 this court said:

> "There was no such towing or dragging of the steam shovel. On the contrary, it was proceeding under its own power, and appellant's own witnesses testified that it was not being towed. The same is true of the respective trucks."

It is respectfully contended by your Petitioner that the above language and the decision in this case limit the policy provision to a degree unwarranted by the language therein used. The terms are to be construed in the light of ordinary acceptation as to their meaning. A reading of the policy herein shows a clear intention to exclude coverage when the vehicle insured is operated in attachment with another. The primary purpose of the provision is to exclude the increased hazards resulting from such operation. That hazard is present whether the vehicle is actually dragging another vehicle or whether all are operating under their own power and are attached merely as a "precautionary measure" as contended for in this case. The hazard of towing a trailer on a paved highway cannot compare with that of operating a series of trucks, chained to each other and these in turn chained to a heavy shovel, up a narrow mountain road over steep grades and around dangerous curves. Under this court's decision the insured cars in the

last case are entitled to coverage, but no coverage would be extended in the former instance.

The strained interpretation which the court places on the policy provision is also shown by the fact that under the language of the decision a car may be towing one moment and not the next. Stress is laid on the evidence of one of the employees of the owner of the truck that the cables were kept slack by means of hand signals. It might be noted in passing that this testimony places a strain on the credulity of any court or jury. Aside from that fact, if given weight, it means that the slackness of the connecting line is decisive as to towing. Therefore, going uphill one may be towing; going downhill, he would not be. The hazard may be as great or more in the latter instance, but coverage is not excluded.

In the trial court and in this court, Appellee has strenuously contended that the trucks were attached simply as a precautionary measure and to prevent slipping; if one truck went over the grade, the others could help it. We ask, what is this but towing? A truck which is held on the road by being attached to another is being towed in the ordinary sense of the term.

The court in its opinion asserts that Appellant contends for a restricted definition of the word "tow-

ing." It is respectfully submitted that it is the opinion of the court which unduly restricted the word, and Appellant seeks merely to have the term construed from the viewpoint of ordinary usage, so that it will include the hazards which are immediately suggested by the exclusion in the policy.

If the court's decision herein is to stand as the law, it means that every insurance policy is thereby affected and that cases now pending will be governed by the narrow construction herein announced, a definition of the word "towing" which was not in the contemplation of the parties at the time of making the contract.

II.

The opinion of the court herein recites as facts material matters which are not in evidence.

The court in its opinion states:

> "It is suggested that the brake on the lead truck slipped, causing it to back into the others. The shovel was not fastened to the truck at the time, and the first two trucks were also unfastened."

There is no evidence in the record to support the assumption that the lead truck backed against the second truck and caused all to go over the bank. This suggestion was devised by Appellee to avoid the inescapable inference that the trucks all went over by

reason of their being fastened together. When it was pointed out at the argument that there was no evidence to sustain this suggestion, counsel for Appellee apologized to the court.

The above quoted statements from the opinion also contain a further misquotation from the evidence in that there was a conflict as to whether the shovel and first and second trucks were unfastened at the time of the loss. C. A. Case testified that although the chain had been removed between the shovel and third truck he saw Noel replace it. (Tr. p. 60.) Brinier testified that a chain fastened the first and second trucks, the cable being between the shovel and last truck. (Tr. p. 71.) The cable was found lying in the road after the accident and no chain was found. It is contended, as was pointed out at the hearing, that there was a conflict in the evidence on this point and that the jury might well have found that all the vehicles were fastened together at the time of the accident.

The above matters were material to Appellant's case herein and a conflict existed in the evidence which the jury was entitled to decide. Because of the above quoted statement from the court's opinion, it is believed that the court misapprehended the evidence in this regard.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this Petition for Rehearing be granted and that the judgment of the District Court of the United States for the Eastern District of Washington, Southern Division, be upon further consideration reversed.

Respectfully submitted,
D. V. MORTHLAND, Yakima, Wash.,
HAROLD A. SEERING, Seattle, Wash.,
WHITTEMORE & TRUSCOTT, Seattle, Wash.,
W. J. TRUSCOTT (*of Counsel*),
Seattle, Wash.,
Attorneys for Appellant.

We, D. V. MORTHLAND, HAROLD A. SEERING, CLEM J. WHITTEMORE and W. J. TRUSCOTT, hereby certify that we are the solicitors and of counsel for the Appellant in the above entitled action and that the foregoing Petition for rehearing is not presented for purposes of delay or vexation but is in our opinion well grounded in law and fact and proper to be filed herein.

D. V. Morthland
Harold A. Seering
Clem J. Whittemore
W. J. Truscott
Attorneys for Appellants.

No. 7010

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

CARL R. FRANCIS,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Montana.

PERNAU-WALSH PRINTING CO., 755 MARKET ST., SAN FRANCISCO

No. 7010

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

CARL R. FRANCIS,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Montana.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States in and for the District of Montana.

No. 832.

CARL R. FRANCIS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

BE IT REMEMBERED that on October 7, 1931, a complaint was duly filed herein, which is in the words and figures following, to-wit: [2]

In the District Court of the United States for the District of Montana, Billings Division No. 832.

CARL R. FRANCIS,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

COMPLAINT AT LAW.

The plaintiff complains of the above named defendant and for cause of action alleges:

1.

That on the 28th day of July, 1917, this plaintiff enlisted for military service in the Army of the

United States and thereupon entered upon said enlistment and continued in the service of the United States up to and including the 23rd day of December, 1918, at which time he was honorably discharged from said service, and the plaintiff is now a resident of the City of Big Timber, in the State of Montana.

2.

That while in active service under said enlistment, as aforesaid, the plaintiff made application to the defendant for insurance under the provisions of the War Risk Insurance Act, and the regulations of the War Risk Insurance Bureau established by said act, in the sum of ten thousand and no/100 dollars, and that said application was accepted by the said defendant and a policy of insurance was issued to said plaintiff in said sum of ten thousand and no/100 dollars, and there was deducted monthly by the defendant from the pay of plaintiff for his said services and by the proper officials the monthly premium in payment of the premiums due on said insurance, and this plaintiff has been informed and believes and, therefore, alleges that a certificate of war risk insurance was duly issued to him by the terms whereof the defendant [3] agreed to pay the plaintiff the sum of fifty-seven and 50/100 ($57.50) dollars per month in the event of total permanent disability incurred by the plaintiff during the life of said insurance contract.

3.

That during the life of said insurance contract, and while plaintiff was in the military service of the United States, as aforesaid, said plaintiff became totally and permanently disabled as the result of a wound in the left chest received in action on or about the 11th day of May, 1918, and plaintiff ever since has been and now is so totally and permanently disabled, and ever since has been and now is suffering from pain in the chest over the scar left by said wound; moist rales, left side of upper lobe; rapid and irregular pulse; numbness of right arm; adhesion in pleura, atrophy of left arm with shrinking thereof; chronic myocarditis; chronic nephritis; chronic respiratory infection; and that such injuries and conditions render him totally and permanently disabled, and he has been so totally and permanently disabled since the said 11th day of May, 1918, and will continue to be so totally and permanently disabled as long as he lives.

4.

That by reason of the foregoing, this plaintiff became and was totally and permanently disabled on the 11th day of May, 1918, and became entitled to receive from the defendant under the terms of said contract of insurance the sum of fifty-seven and 50/100 ($57.50) dollars per month for each month thereafter.

5.

That on or about the 23rd day of December, 1930, plaintiff made demand upon said defendant for the payment of said insurance, and thereafter filed proofs and negotiations were carried on between plaintiff and defendant, and that thereafter and on the 8th day of August, 1931, said defendant denied said claim of the plaintiff, and plaintiff now alleges that a disagreement exists between plaintiff and defendant as to plaintiff's claim for insurance, and defendant has wholly failed and refused to pay the sum due or any part thereof. [4]

WHEREFORE, plaintiff prays judgment against the defendant for the sum of nine thousand two hundred and no/100 ($9200.00) dollars, being the amount due him at fifty-seven and 50/100 dollars per month from the 11th day of May, 1918, and for the sum of fifty-seven and 50/100 dollars each month hereafter, together with an allowance for the payment of medical examinations and inspections of plaintiff, and travel incident thereto; that the judgment herein provide for the payment to plaintiff's attorney of a fee of ten per cent of said judgment; for his costs and disbursements herein incurred; and for such other and further relief as to this Honorable Court may seem meet and proper in the premises.

PHILIP SAVARESY,
Attorney for Plaintiff, Billings, Montana.

State of Montana,
County of Sweet Grass.—ss.

Carl R. Francis, being duly sworn, upon his oath deposes and says:

That he is the plaintiff named in the foregoing complaint; that he has read the said complaint and knows the contents thereof, and that the matters and things therein stated are true of his own knowledge, except as to such matters and things herein stated on information and belief, and as to those he believes them to be true.

CARL R. FRANCIS.

Subscribed and sworn to before me this 4th day of September, 1931.

[Seal] MARY J. MICHELS,
Notary Public for State of Montana, residing at Big Timber, Montana.

My commission expires Jan. 26, 1934.

[Endorsed]: Filed Oct. 7, 1931. C. R. Garlow, Clerk. [5]

Thereafter, on January 15, 1932, answer was duly filed herein, which is in the words and figures following, to-wit: [6]

[Title of Court and Cause.]

ANSWER.

Comes now the defendant and for its answer to the complaint of the plaintiff herein admits, denies and alleges:

I.

Admits the allegations of Paragraph I of the complaint herein, except as to the residence of the plaintiff, and denies that Carl R. Francis is now a resident of the City of Big Timber in the State of Montana.

II.

Denies the allegations contained in Paragraph II of the complaint herein.

III.

Denies the allegations contained in Paragraph III of the complaint herein.

IV.

Denies the allegations of Paragraph IV of the complaint herein.

V.

Admits that the plaintiff made demand upon the defendant for the payment of said insurance and admits that he filed proofs and admits that the defendant denied the claim of the plaintiff, and that a disagreement exists, and denies each and

every other allegation in said paragraph V and in all of the complaint not hereinbefore specifically admitted, denied or qualified. [7]

WHEREFORE, the defendant prays judgment that the case be dismissed and the defendant have its costs.

WELLINGTON D. RANKIN,
United States District Attorney, for the District of Montana.

By D. L. EGNEW,
Assistant U. S. District Attorney for the District of Montana.

D. D. EVANS,
Insurance Attorney.
(Attorneys for the Defendant.)

United States of America,
District of Montana.—ss.

D. L. Egnew, being first duly sworn on oath, deposes and says: that he is an Assistant United States Attorney for the District of Montana and that he has read the contents of the foregoing answer and that the same are true according to his best knowledge, information and belief.

D. L. EGNEW.

Subscribed and sworn to before me this 9th day of January, 1932.

[Seal] H. H. WALKER,
Deputy Clerk.

Service of the within answer admitted and a copy had this 11th day of Jan., 1932.

PHILIP SAVARESY,
Attorney for the Plaintiff.

[Endorsed]: Filed Jan. 15, 1932. C. R. Garlow, Clerk. [8]

Thereafter, on June 9, 1932, verdict was duly rendered and filed herein, which is in the words and figures following, to-wit: [9]

[Title of Court and Cause.]

VERDICT OF THE JURY.

We, the jury, duly impanelled and sworn to try the issues in the above entitled action, find all of the issues herein in favor of the plaintiff, Carl R. Francis, and against the defendant, The United States of America, and find that the said Carl R. Francis became permanently and totally disabled on May 10th, 1918, and entitled to monthly payments of Fifty seven and 50/100 ($57.50) Dollars per month from that date.

THOS. A. TOBIN,
Foreman.

[Endorsed]: Filed June 9, 1932. C. R. Garlow, Clerk. [10]

Thereafter, on June 17, 1932, judgment was duly filed herein, which is in the words and figures following, to-wit: [11]

In the District Court of the United States for the District of Montana, Billings Division.

No. 832

CARL R. FRANCIS,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

JUDGMENT.

This cause came on regularly for trial on the 8th day of June, 1932, Philip Savaresy and George S. Smith, both of Billings, Montana, appearing as Counsel for plaintiff, and D. L. Egnew, Esq., Assistant United States Attorney for the District of Montana, and D. D. Evans, Esq., Insurance Attorney for the United States Veterans Administration, appearing as Counsel for the defendant. A jury of twelve persons were duly and regularly impanelled and sworn to try the issues in said cause, witnesses were sworn and testified for and in behalf of plaintiff and defendant, and after hearing the evidence, arguments of the respective counsel and the instructions of the Court, the jury retired to consider their verdict. After due deliberation, the jury returned its verdict into Court in the words and figures as follows, to-wit:

[Title of Court and Cause.]

VERDICT OF THE JURY.

We, the jury, duly impanelled and sworn to try the issues in the above entitled action, find all of the issues herein in favor of the plaintiff, Carl R. Francis, and against the defendant, The United States of America, and find that the said Carl R. Francis became permanently and totally disabled on May 10th, 1918, and entitled to monthly payments of Fifty Seven and 50/100 ($57.50) Dollars [12] per month from that date.

Thos. A. Tobin, Foreman.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is ORDERED, ADJUDGED AND DECREED, That Carl R. Francis, plaintiff, do have and recover of the defendant, The United States of America, the sum of Ninety two hundred and no/100 ($9200.00) dollars, and all further payments which may be due under the contract of insurance and in accordance with law, said sum of ninety two hundred and no/100 ($9200.00) dollars being the installments on said insurance from May 10, 1918, to the 10th day of September, 1931, being the monthly anniversary date of the commencement of said permanent and total disability immediately preceding the filing of the complaint herein; and the Court, as a part of its judgment, determines and allows as a reasonable attorney's fee for the attorneys of the plaintiff for services rendered and/or to be rendered herein ten

(10%) per cent. of the amount recovered under the contract of insurance and to be paid by the United States Veterans Administration out of the payments made under this judgment and in accordance with law at a rate of ten (10%) per cent. of each and all of such payments until paid in full and to be deducted from such payments made to the plaintiff.

Judgment entered this 17th day of June, A. D. 1932.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed June 17, 1932. C. R. Garlow, Clerk. [13]

Thereafter, on September 30, 1932, bill of exceptions as signed, settled and allowed was duly filed herein, which is in the words and figures following, to-wit: [14]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, That this cause came on regularly for trial at 10:30 o'clock A. M., on the 8th day of June, 1932, before Honorable Charles N. Pray, one of the Judges of the above entitled Court, sitting with a jury, at Billings, Montana. George S. Smith and Philip Savaresy, of Billings, Montana, appeared as counsel for the plaintiff, and

D. D. Evans, Insurance Attorney for the Veterans Administration, and D. L. Agnew, Assistant United States Attorney, of Helena, Montana, appeared as counsel for the defendant. A jury of twelve men having been duly and regularly empanelled and sworn to try the issues, the following proceedings were had:

The plaintiff offered the following evidence in support of his complaint:

TESTIMONY OF CARL R. FRANCIS,

in his own behalf:

My name is Carl R. Francis. I reside in Billings, Montana. I am thirty-seven years old. I am a married man and I have seven children, two of whom are stepchildren. Yes, in my complaint I stated that I was a resident of Big Timber at that time. It so happened that I was working at Big Timber, in the rodeo, and was temporarily residing there at the time the complaint was sent to me. Outside of that I have been a resident of Billings for eleven years or so. [15]

I enlisted in the service about July 28, 1917, from Miles City—my discharge shows Helena. I was in the service until December 23, 1918. I was discharged with an honorable discharge. At date of enlistment I was twenty-two years old. I was not married at that time. I have had two years education in High School and a short course in bookkeeping and typing. While I was in school before entering the service, I worked for my board in a

(Testimony of Carl R. Francis.)

hotel, and later, I was in the oil fields, on a tank farm, as a steel worker, that is, a boiler maker, and I had harvested some in Kansas, and had done a little work in cooking—counter work—at Tulsa, Oklahoma. Yes, I mean by that restaurant work. No, I never did any clerical work before that.

Before entering the service my physical condition and nervous condition were good. I never had any sickness or accidents before that. I was in the infantry branch of the service during all of my service and I did overseas duty. I sailed December 15, 1917. I first went to Liverpool, England. I eventually went to France, about three weeks later. After I got there I first went to Le Havre and from there to Leacourtine, France. I enlisted in A Company, 16th Infantry. After I got to A Company, of the 16th Infantry, I made application for war risk insurance. That is my signature to "Plaintiff's Exhibit A" and it is an application for war risk insurance.

Mr. SMITH.—I will read this:

Headed: "Application for War Risk Insurance. I hereby apply for insurance, $10,000.00, payable to myself, for total, permanent disability. My full name is Carl R. Francis. Born on the 11th of February, 1895. My age is 23 years. Home address, Miles City, Montana. Company A, 16th Infantry, A. E. F. Date of enlistment, July 28, 1917."

Exhibit A.

APPLICATION FOR INSURANCE
to
BUREAU OF WAR RISK INSURANCE
UNITED STATES TREASURY DEPARTMENT

MAKE NO
ENTRIES HERE

Received .....
Entry number .....
Index card.....L. W.....
Abstracted .....on
Sheet No. .....
Acknowledged .....
Application Number .....

I hereby apply for insurance in the sum of $10,000, payable to myself during total permanent disability and from and after my death to the following persons in the following amounts:

Name of Beneficiary (If married woman her own christian name must be stated)	Relationship to applicant	Post Office Address of each beneficiary (Full address must be given)	Amount to be paid to each beneficiary
Allie Cly Francis	Sister	Norris, Okla.	$10,000

In case any beneficiary dies or becomes disqualified after becoming entitled to an installment but before receiving all installments, the remaining install-

ments are to be paid to such person or persons within the permitted class of beneficiaries as could under the laws of my place of residence be entitled to my personal property in case of intestacy. I authorize the necessary monthly deduction from my pay or if insufficient, from any deposit with the United States in payment of the premiums as they become due unless they be otherwise paid. If this application is for more than $4,000 insurance I offer it and it is to be deemed made as of the date of signature. If this application is for less than $4,500 insurance and in favor of wife, child or widowed mother, I offer it and it is to be deemed made as of February 12, 1918. If this application is for less than $4,500 and in favor of some person or persons other than wife, child or widowed mother, I offer it and it is to be deemed made as of date of signature.

My full name is Carl R. Francis.

I was born on the 11th day of February, 1895, my age at nearest birthday being 23 years.

Home address ....none.... , Miles City, Mont.
(street and number) (city) (state)

Rank Pvt., Organization Co. A 16th Inf. station, A. E. F.

Date of enlistment or appointment July 28, 1917.

Signed at MY STATION, A. E. F. this 22nd day of Jan. 1918.

S/ Carl R. Francis.
(signature of applicant)

Witnessed by
Basil D. Spalding
Capt. Inf. [17]

Mr. EVANS.—At this time, it may be admitted by the defendant that $10,000.00 of insurance was in force May 10, 1918, the date from which the plaintiff claims permanent and total disability. At the time of the pleadings, I did not have the data and was, therefore, forced to deny. It will [16] be further admitted that it was in force on April 1, 1919, and that it lapsed for nonpayment of the premium due in April of 1919, as conceded by the plaintiff; also——

The COURT.—What is the date of the lapse?

Mr. SMITH.—May 1, 1919.

Mr. EVANS.—It may also be admitted that a disagreement exists, and that no proof is necessary.

(Testimony of Carl R. Francis.)

(Plaintiff continuing): After I got to France I went to what is known as the front lines. That was the last of January, 1918, or the first of February, 1918. I was almost continuously on the front pretty much of the time until the 11th of May, 1918, outside of times when we went to rest camps—back and forth between front lines and rest areas—but almost continuously on the front. Coming down to the evening of May 10, 1918, and the morning of the 11th, 1918, I was acting as guide for 2nd Platoon of A Company, 16th Infantry, and that night I was to bring the F Company of the 16th Infantry out—relieve them from duty—and to guide Company A in. I was going in on the evening of May 10th after dark. We were in the woods, had been camped back of the town of Buray,

(Testimony of Carl R. Francis.)
and we were to go up that night and take the road so many paces apart, and just as we got through the town and just as we got out, the enemy began shelling the road and I was hit by high explosive—3 inch shell. I do not know when I was hit. I felt the burn and lost the use of my left side and arm, but I didn't feel any pain. There was some doubt as to whether we were following the 1st Platoon of A Compnay, 16th Infantry, and I told the Sergeant in charge of the 2nd that I would go up and see if it was the 1st Platoon. Of course we all fell at the side of the road when they began shelling, and I went up there, and when they came up, I told Rogers I believed I was hit, as I felt blood inside of my shirt. He told me to go back to the regimental infirmary, and before we got back there, [18] the man, Higgins, who had been detailed to take me back, was carrying me, or almost carrying me. Then from then on I was in the hospital until the time of my discharge. They gave me a shot in the back, to prevent blood poisoning, and then as they could get an ambulance, I and others who were there were put in, but they figured they would push farther back in the lines, to pick up other wounded, and I suppose it was that night I lost track of time, and we went out and hit several field hospitals where they would sometimes take patients, and we would always stop and get attention, and they would keep relaying us back, and we finally reached a French Base Hospital, and I was oper-

(Testimony of Carl R. Francis.)
ated on there. No, they did not get the shrapnel out. I went under ether there, and I thought they did. Later I went to Military Red Cross No. 1, Paris, France. I was operated on at that place, under ether. From there I went to Base No. 34, Nantes, France. I was in Paris a week or ten days. They did not get the shrapnel out at Paris. After I got to Base No. 34, I was operated on several times. I should judge six times, under ether. That would be under a complete anaesthetic. I was operated on under a local several times. I was full of pus, and they decided that they could reach the shell from under my arm, and they would probe for that several times a day, probably two or three times, and give me daily dressings, and at times, it was dressed three or four times a day, and they had tubes in these places, and what they call Dakin's solutions. They used so many drops a minute. On this incision under my arm the Doctor would use just a local and would come up and say: "Now we are going to have some fun," and would start probing. Yes, I knew when they got the shrapnel out. I had bled several times, and finally I got where they had to give me blood, several hundred cc's of blood, and after that they took me right down to the operating room and went into my back and took the piece of shrapnel out. During the time this shrapnel was in my body I had fever and I was down to skin and bones, [19] you might say. Yes, it is my recollection that I had continuous fever

(Testimony of Carl R. Francis.)

during that time. I was full of pus all the time. As I remember, it was three months from the date I was hit—the 10th of August—that the shrapnel was taken out. Between the time I was hit and this time, I had this local anaesthesia under the arm, sometimes often and was practically confined to my bed all the time I was there. When doing this probing under my arm with a local it caused me much pain. There was not much pain on the outside, but down in, it was terrible. These daily dressings would give me pain. When I heard the nurses and doctors coming, I would cover up my ears, and it was a daily dread. We would lay in bed and hear the dressing table coming down the ward and would just cringe with dread of what was coming. Before they got the shrapnel out I had bleedings and hemorrhages; frequently everything seemed to give way and start bleeding. Then the doctors and nurses would come up with crooked needles and reach in through the wound in my chest and sew me up. That would be done without an anaesthetic. It would cause me great pain. For some time I was in the death ward—a place with twelve beds in it—and when a patient was very bad, he would be taken there—more to give him special attention. It was just dubbed the death ward. It was recognized as a place where serious cases were taken. During the time I was in the hospital I had some coughing spells. They were bad, and they would hold the coughs down as much

(Testimony of Carl R. Francis.)
as possible. I couldn't smoke; it would tear me, choke me, if I did. I lost weight while I was in there. I was down to skin and bones, less than 100 pounds, I imagine. I did not have the use of my left arm. It was in a sling practically all the time. Just before I left there, I began to use it a little. I was a bed patient most of the time until after the shell was taken out. After the shell was taken out, I was not able to straighten up—I didn't really straighten up, and I didn't really get the use of my left arm until I got to Des Moines, Iowa. After they got the shrapnel [20] out, I can't be positive how long I was in bed after that, but I imagine a month or a month and a half—two months—I have no way of knowing.

I understand that empyema is pus on the lungs. I was full of pus practically all the time. They had tubes in me on account of that. The size of these tubes I should judge was about the size of my thumb and cut different ways. They were of black, curved rubber and they would stick them in there—in all the places where the scars are now. The shrapnel was taken out of my back; they had to cut down the back to get it. I had a tube in two places in the back and under the arm and in front. After I got up I was in the hospital practically all the time until after I was discharged. I was really convalescent at a time just before the discharge, but I don't remember just when. I was what is known as a convalescent patient. We didn't have our clothes.

(Testimony of Carl R. Francis.)

We wore pajamas and bathrobes. We didn't have to stay right in bed. I stayed in the hospital until a day or two before my discharge. I was discharged from Fort Riley, Kansas. I have scars on my body showing these wounds.

Mr. SMITH.—Your Honor, I would like to have the plaintiff show these to the jury, with Your Honor's permission.

The COURT.—All right.

Mr. SMITH.—Take off your coat (to witness).

(Witness removes coat and exhibits scars to the jury.)

Mr. SMITH.—Does Your Honor wish to look at them?

The COURT.—No, sir.

Mr. EVANS.—One question, Mr. Francis. Did you see the shrapnel when it was taken out?

Mr. FRANCIS.—I did.

Mr. EVANS.—How large was it,

Mr. FRANCIS.—Oh, about the size of the end of my thumb. [21]

Mr. Evans. I thought the jury might be interested so as to distinguish between the shrapnel wound and wound of operation afterwards.

Mr. Smith. At this time, I would like to have this man's service record, Mr. Evans.

(Mr. Evans produces service record).

(Plaintiff continuing). That is my signature to the document marked "Plaintiff's Exhibit B," and it was made at the time of my discharge.

Mr. Smith. I now offer Plaintiff's Exhibit B in evidence.

The Court. Let it be admitted and read to the jury.

(Document is read to the jury.)

EXHIBIT B.

C—132 785

REPORT OF PHYSICAL EXAMINATION OF ENLISTED MAN PRIOR TO SEPARATION FROM SERVICE IN THE UNITED STATES ARMY.

Francis (Surname) Carl R. (Christian Name) 41682 (Army serial number)

Pvt. (Grade) 4th Co., 2nd Bn. 164 D.B. (Company and regiment or arm or corps or department)

Cook

(Occupation prior to entry into service.)

DECLARATION OF SOLDIER.

Question. Have you any reason to believe that at the present time you are suffering from the effects of any wound, injury, or disease, or that you have any disability or impairment, of health, whether or not incurred in the military service:

Answer. Yes.

Q. If so, describe the disability, stating the nature and location of the wound, injury, or disease.

A. Shell fragment wound left chest.

Q. When was the disability incurred?

A. May 10th, 1918.

Q. Where was the disability incurred?

A. Broyes, France.

Q. State the circumstances, if known, under which the disability was incurred.

A. Wounded in action.

I declare that the foregoing questions and my answers thereto have been read over to me, and that I fully understand the questions, and that my replies to them are true in every respect and are correctly recorded.

S/ Carl R. Francis
(Signature of soldier.)

Witness:

Chas. W. Abbott
(Signature of witnessing officer.)

Charles W. Abbott, Capt. Inf. U. S. A.
4th Co. 2nd Bn. 164 D. B.
(Rank and organization.)

Place Camp Funston, Kansas.

Date December 21, 1918.

Form No. 135-3, A. G. O.
Nov. 11, 1918. [22]

CERTIFICATE OF IMMEDIATE COMMANDING OFFICER.

I CERTIFY THAT:

Aside from his own statement I do not know, nor have I any reason to believe, that the soldier who made and signed the foregoing declaration has a wound, injury, or disease at the present time, whether or not incurred in the military service of the United States.

The soldier who made and signed the foregoing declaration has a wound, injury, or disease, which was incurred about May 10, 1918, at Broyes, France.

The nature and location of the wound, injury, or disease, so far as known, are Shell fragment wound left chest.

The circumstances under which incurred were Wounded in action.

In my opinion the wound did originate in the line of duty in the military service of the United States.

Remarks

S/ Chas. W. Abbott.

Chas. W. Abbott, Capt. Inf. USA. 4th Co., 2nd Bn. 164 D. B.

Camp Funston, Kansas, Dec. 21, 1918.

(Place and date)

CERTIFICATE OF EXAMINING SURGEON.

I CERTIFY THAT:

The soldier named above has this date been given a careful physical examination, and it is found that

He is physically and mentally sound with the following exceptions: (Describe the nature and location of the defect, wound, injury, or disease.)

Shell fragment wound left chest anterior, left axilla, and lower angle of scapula posterior. Adhesions throughout left chest as a result.

The wound, injury or disease is likely to result in disability.

In my opinion the wound, injury, or disease did originate in the line of duty in the military service of the United States.

In view of occupation he is thirty (30) per cent disabled. Remarks.

S/ G. K. Purves,
G. K. Purves, Capt. M. C.

Camp Funston, Kansas, Dec. 21, 1918.
(Place and date) [23]

(4)

REPORT OF BOARD OF REVIEW.
(See instruction 2.)

From a careful consideration of the case and a critical examination of the soldier,
WE FIND:

He is physically and mentally sound with the following exceptions: (Describe the nature and location of the defect, wound, injury, or disease.)

Diagnosis and remarks of examining Surgeon concurred in.

The wound, injury, or disease is likely to result in death or disability.

In our opinion the wound, injury, or disease did originate in the line of duty in the service of the United States.

In view of occupation, he is thirty per cent disabled.

S/ Jasper Wm. Lockhart, Capt., M. C., U. S. Army.

(Name) (Rank)
Jasper Wm. Lockhart.

S/ Sydney J. Havre, 1st. Lt., M. C. U. S. Army.
(Name) (Rank)
Sydney J. Havre.
S/ Grant S. Reeder, 1st. Lt., M. C., U. S. Army.
(Name) (Rank)
Grant S. Reeder.
Camp Funston, Kansas, December 21, 1918.
(Place and date)

INSTRUCTIONS.

1. This report will be made out for each soldier, immediately preceding separation from service in The United States Army.

2. If the declaration of the soldier and the certificate of the examining surgeon do not agree, the case will be referred to a board of review, to consist of not less than two medical officers, convened by the camp, post, or regimental commander, which will complete the report on page 4 of this form.

3. When completed the report will be forwarded, with the service record of the soldier, to the Adjutant General of the Army in compliance with instructions prescribed in orders and regulations. [24]

Mr. Evans. Your Honor, if the Court has no objection, may we have an order that a copy be made of this exhibit to be placed in the files in this case, in order that the original may be returned to the records of the Veterans Bureau—and this applies to Exhibit A also.

(The Court assents.)

(Testimony of Carl R. Francis.)

(Plaintiff continuing). After I was discharged from service I went to my father's home, which was at that time at Walls, Oklahoma. I stayed there about six months. He moved at that time to Talihina, Oklahoma. While there I didn't do any work at all. I was not able to do any. I just lay around the greater part of the time, thinking to gain strength. A little later I put in an application for compensation. It was awarded. They allowed me total until I went up to Forth Smith, Arkansas, and went to work on a job there and wrote and told them, and they cut me down. I have been paid compensation at all times since, continuously, outside of when I was in vocational training. There have been different percentages of disability awarded me, from 20% to total. At the present time I am getting $66.00. I imagine that means 66%. This compensation I speak about—that was a different payment [25] entirely from this insurance. There is no connection whatever. Since I have been out of the Army I have been in Government hospitals about four times, maybe more. One time I was there for a day or two, and it seems to me at the other times for a month or more. I am not positive about that.

After leaving my father's home I went to work. I first worked at the Wide-Awake Cafe at Fort Smith, Arkansas. I started to work there through strawberry time—must have been April or May. I was there six weeks. That was in 1919. I did

(Testimony of Carl R. Francis.)

counter work as a waiter. They wouldn't let me do table work because I couldn't carry the loads. I could carry one or two orders at a time—coffee and such things. I stayed there six weeks as I remember. I quit there, I didn't feel good there and I wanted to get back to Montana. I felt the mountains would make me all right. I wrote to the Veterans Bureau at the time and told them I wanted to get back to Montana.

I next worked at the Albin Cafe, at Cheyenne, Wyoming. I worked five days, during the rodeo. I helped in the kitchen. I was not able to do my work there. They used me because it was Fair time and help was hard to get. As soon as that was over, the job expired. I was there five days, during July.

I next worked in 1919 at Miles City, for Jim Peterson. I had worked for him before I enlisted. He didn't put me to work when I got there, but finally he found a place for me, and I must have been there six weeks or two months. I was a waiter. I did not satisfactorily perform all the duties of a waiter there; on account of my inability to carry loads, nervousness, I slopped coffee all over and dropped things, and my general nervous condition. I did not leave there, but the place was sold and the help retained, but within a few days I was discharged. I worked for the new proprietor two or three days and I was then discharged. The place was filled by some on else. I was discharged

(Testimony of Carl R. Francis.)

on account of my inability to discharge the duties required of me, along the lines mentioned. [26] It must have been September or October, 1919, when I worked for Jim Peterson.

Next I worked at the Ingham Cafe, now Metropolitan Cafe, at Miles City. I worked there about a month or six weeks, as a waiter. There was practically no business. I worked afternoons. It was just a matter of some one being there. I left there and went into vocational training. I went into vocational training about February, 1920, as I remember. I was placed in that training by the Vocational Board. They first sent me to the Bozeman State College, at Bozeman. I first learned bookkeeping, typing and accounting. I continued with that course a very short time. I don't know exactly. They took me off typing. The teacher said I couldn't keep my mind on that, and they took me off that and left me with bookkeeping and I stayed with that probably, say, a month, maybe more, and they changed my objective to baking. I was not able to make any progress at Bozeman, none whatsoever, and I was surprised, as I had considered myself a good student before, but I got nervous and I wanted to kick things. I could not stand it to be inside, in a classroom. There was an advisory board came down from Minneapolis and they talked and spoke of this baking course, and I thought with what restaurant experience I had had, it would be a good thing, and I spoke to them

(Testimony of Carl R. Francis.)
and they changed my objective to baking, the Board did. When I was at Bozeman I did make a sincere attempt to do my work. I wouldn't have taken vocational work if I hadn't wanted to better myself. After the Board changed me to baking, they sent me to the Purity Bread Company in Billings, Montana. I had to have some preliminary experience before they would accept me at Dunwoody, two years at high school and two years actual baking experience, and they put me in the Purity Bread Company in order to gain actual baking experience. I was unable to do the bread work there; it was too heavy for me, and I was put downstairs in the cake room, where the work is light. My work was mostly [27] observation, to learn what I could, and of course help out. If I had been employed there as a cake baker, there would have been heavy lifting connected with the work there. As it was, there was none for me to do. I was not getting any pay from the Purity Bread Company. As I remember, all bakers take their bread home, and I was entitled to that, but that was before I was married, I didn't need it, and I don't remember that I received any pay at all. I was with the Purity Bread Company until through the winter of 1920 into the spring, up until July, I believe, 1921, no, 1920.

From the Purity Bread Company I went to Minneapolis, to Dunwoody. Dunwoody is a school where milling and baking and chemistry are taught,

(Testimony of Carl R. Francis.)
and was founded no doubt by a man named Dunwoody. I was there six months. My work consisted of chemical work—work in the experimental laboratory, classroom, dough room and bake shop. I couldn't keep up with my chemistry or laboratory work; it was too tedious; I couldn't do that on account of nervousness. I couldn't concentrate; I had to have more action. The bake shop work consisted of learning all about the machinery; after the dough is done, moulding it—all machinery—panning, proving and baking. There is no real, actual work to do there; all machinery classes, as they were divided, were put in twelve to sixteen at the time. In reference to the experimental shop work, they had an experimental baker. Six of us would go there for so many days. We were allowed to experiment. We had a small mixing machine and we could mix six loaves of bread at a time. We were allowed to experiment with anything we wanted to. There was no heavy work connected with that. With reference to the laboratory work down there, I did not do any of that with any results. I didn't get a certificate that I had finished the work because you have to have two years actual experience before they issue you a certificate. I was never able to get that.

After I finished my schooling at Dunwoody, the Board sent me to Nichols' Bakery, at Billings, Montana. I [28] was there a short time, probably a month or a month and a half. The work consisted

(Testimony of Carl R. Francis.)

of just general shop work, all hand work, and general bake shop work. I was physically unable to do the work. The bench work was too heavy; the lifting of pans was too heavy. The pans were made in sections and weigh quite a bit, 30 or 40 pounds, and it was impossible for me to handle the fans with the heat, and those probably weigh 75 to 100 pounds, maybe 50, and they had to be handled and I couldn't do that. My condition after I had worked there for a day was, well, I would get up at four o'clock and go down and work until three, sometimes until five o'clock. I came alone and I stayed at a hotel, and when I would go off shift, would throw myself on the bed and lay there until time to go to work in the morning, with nothing to eat and without undressing. If everything went all right, I would quit work at the bakery each day maybe three o'clock—just whenever I finished my work.

After I had worked at Nichols' Bakery for this period I went to George Stevens, the Bureau man here, and told him I just couldn't stand it; I couldn't do the work; it was killing me to be there; and the Government transferred me away from there. I was transferred to some other work, restaurant work. For that reason I never got the two years' training which it was necessary for me to have in order to entitle me to a diploma at Dunwoody. It was the Vocational Board that made the transfer to cooking; they changed my objective.

(Testimony of Carl R. Francis.)

I first went to the Metropolitan Cafe at Billings in that work. I was there a few weeks, just to pick up what I could, to observe and to work into a job. From there I went to the Main Cafe. I finished my training there, that is, the old Main cafe here in Billings.

I was there at the Main Cafe a year or more, possibly sixteen months. I do not remember when I finished my training. It must have been in August, September or August, 1920, or it may have been 1921. It would have to be 1922 if I started school in 1920. I had no fixed duties in the Main Cafe, [29] and at the Metropolitan Cafe I didn't do any work; in fact, they wouldn't let me. I tried to do work at both the Main and the Metropolitan, with no success. I was too weak—just couldn't keep up with the work, on account of lack of strength. My nervous condition was bad enough; it was bad all right.

After I left Vocational Training, I first worked at Shelling's Cafe, here in Billings, for about two months. I don't remember what months those were. It must have been December, 1922, and January, 1923; it comes to me it was. My duties there were as cook. I was not able to discharge my duties; I couldn't do the lifting. If it got real busy, I couldn't stand the heat over the range, and I couldn't look after the job without help. I had fainting spells and trouble with my side. While I was there I was helped by the others. Any of the

(Testimony of Carl R. Francis.)

help who happened to be around and Mr. Shelling helped me. I was supposed to be doing work ordinarily done by a cook. I was discharged eventually because I couldn't swing the job.

My next work I believe was at the Metropolitan, possibly the Luzon. That was in August and September, 1923, through Fair time, yes. That was during a busy time, during the Fair. My work consisted of being a waiter. I helped out—it was a busy time and they had to have help. I carried the loads on my right arm.

From January, 1923, until August of that year I didn't do any work. I wasn't able to do the work. I was sick a great part of the time.

After I left the Luzon I can't say positively where I next worked—I can't remember. Yes, it was the Ferndale. I started to work there about January, 1923, or 1924. I worked there about two years and eight months. I left there I believe about August, 1926, I did chef and general kitchen work —pastry. There was no real hard work there for me, no, because I wasn't able to do it, and what I couldn't do some one else had to do for me. I had help there in doing my work. Whoever happened to be on shift—sometimes it was some one from the [30] dining room and sometimes some one from the kitchen. Ordinarily it was the dishwasher, and during most of the time I was there, there was some one with me an hour in the morning and evening, before I would go off shift. There was heavy

(Testimony of Carl R. Francis.)
lifting to be done, and I couldn't have done it. Yes, I had duties as a cook doing some heavy lifting; there was work that should have been mine. I got it done by calling some one who could do it, or by leaving it for the next shift. Those heavy things that were to be lifted consisted of pots, the large containers canned goods might come in, maybe lard. Most of the meat was cut there, outside of heavy ribs and such like. The stock pots—it was impossible for me to lift those, if they were of any weight at all. I would call the dishwasher to lift those. I should have done it ordinarily. I had other trouble in doing my work—faintness, drawing under my heart or pain under there, and at times I would get a catch in my neck and this would make me sick. When I get these spells—these catches—I cannot continue with my work. I have to sit down and lay across a table or bed on my stomach. These spells would last any time from five minutes to half an hour. The spells would vary. Sometimes I wouldn't notice it for days or weeks, and then again it would happen several times a day for weeks at a time. There was no set time when they would come on. If I would get overheated, I would naturally think that was the cause. These spells came on at that time, after I got overheated. If I would work very long at a time, I would get awfully tired in the left shoulder blade and this would cause it to ache and I would get a catch in my neck from it, and I would have to stop my

(Testimony of Carl R. Francis.)

work until this eased up. I would just have to let my work go and some one else take care of it, or if not, it would pile up, and they would have to get along as best they could. There was almost always some one there to help. I was discharged from there because I couldn't do my work as I should. [31]

My next employment was at the Metropolitan. I was there just a short time, through the Fair. My experiences there were the same as at the Ferndale.

I next worked after that at the New Bungalow. I was there one or two months, in September or October, 1926. They made special arrangements for me there. They built the tables high so I could work on them; they arranged the help so I could have help when needed, for lifting, and they made special arrangements about the tables. Frank Larson was the Manager there and Bill Carlin was the owner. I was not able to do my work there. My experiences there were similar to what they were at the Ferndale.

My next work was at the Northern Hotel. I am not sure when it was, but I believe it was, as you say, in March, 1927—from March 17, 1927 to May 24, 1927. Tom Peterson was the chef and Mr. Blair the steward there. My experiences there were about the same. I couldn't stand the heat, had fainting spells and would have to go to the door for air and rest right along. The work was too heavy for me there. I couldn't stand the heat from the boiler. I

(Testimony of Carl R. Francis.)
left that work as I went to the hospital at Helena—was sent there by Dr. Wernham.

My next work, I went back to the Ferndale again. I tried to get back in the Northern, but they wouldn't take me back. I was there at the Ferndale this time from July, 1927 to April, 1931. My experiences there compared to before were practically the same. People helped me out there all the time. I quit the Ferndale in April, 1931 because I had gotten in such shape I couldn't get along with anyone—was in a nervous condition. I dreaded to go to work, and when I would leave, I would go home and go to bed and maybe never leave home until it was time to go to work the next morning, and maybe something would come up that would upset me, and I would go all to pieces, and so I just quit. I knew Mr. Loomis was dissatisfied with my work.

After leaving the Ferndale this time I went to work for Bill Carlin, Carlin Cafe. I worked there about a month and a [32] half. I was discharged because of inability to do the work—along the same lines.

After that I worked at the Byron Cafe. I worked there six days. I went there with the understanding that Mr. Byron was to do the heavy work, such as blocking the meat, so that I wouldn't have to lift loins, etc. He was to do that, but he had to go to Bozeman, and I couldn't do it, and so I was discharged by the Manager.

(Testimony of Carl R. Francis.)

After that I worked at the Big Timber Cafe, at Big Timber. I was there through a rodeo—I don't remember how long, during a rush season. The butcher blocked the meat out and Mr. Webb is a cook himself, and he came to the kitchen and helped me with things I couldn't do. I worked there for a few weeks, but I found the work was too heavy, and I was away from home, so I left.

Since then I ran a lunch room at the Sugar Factory. I had some one with me all the time. I didn't do any of the work myself, practically none.

I worked at Casey's, at Laurel, through the Basketball Tournament. I got along with his help; he was there in the kitchen a good deal of the time. After the Tournament was over, they didn't need me any longer. After that I didn't work at all for three months.

Now I am working at the Billings Golf and Country Club. I can't do any work there whatever; I have to hire it done. Referring to these different places where I was employed, I know I couldn't have done my work as I should have done it, and that I could have done it without assistance. My physical condition from the time of my discharge from the Army to the present time has been bad, generally,—nervousness, aching in my left arm and muscles down into the palm of my hand, mostly the little finger and next to it. I have been suffering from catches in the wound for years it seems to me —since I was out of the Army—ever since I was

(Testimony of Carl R. Francis.)

hurt. My recollection is that those attacks [33] came at all times since my discharge from the Army. These spells just knock me out. If I can, I have to lay down. I am not unconscious, but I am—I just have to lay down, my left arm down, until it goes away. It makes me weak and nervous and I sweat, and if at times I reach for things, without thinking of it, I get a catch here (indicating) and it goes into my neck, and that is very painful. These attacks are accompanied by dizziness, and I am sort of groggy, but I am not plumb out—not unconscious. I know what is going on, but I am not able to carry on. These attacks are accompanied by drawing pain—I imagine it is in my heart. It feels like pulling in, and it is very painful. After it lets up, I am sick and weak. I have had these attacks since my discharge at various times—sometimes maybe I won't have one for weeks or months and maybe longer, and then again they will come several times a day for weeks at a time. When they come I have to lay down, oh, for five minutes to half hour, and sometimes for an hour, until I feel good, and I just feel like staying in bed. They are more apt to come when I am tired. Referring to this pain in my shoulder, it comes just when I happen to get in that particular position. I would not be able to continue with my work then for a while. It would be five, ten, fifteen minutes before I would be able to get over them. I have been troubled with those pains since my discharge continuously.

(Testimony of Carl R. Francis.)

Referring to my work as a chef in a restaurant, that requires concentration or mind work. You have got to figure stuff, make your menus, etc. You have got to keep the orders coming into the kitchen in your mind, supposed to remember them. I must have been forgetful, as frequently arguments over mistakes I would make took place. I remember that there has been difficulty in this respect. After I do a day's work I go home and go to bed. I go home and go to bed almost every day after my work. I would unless there was something that was very important to keep me up. This has been continuous since my discharge. I would probably get up and read the paper and sometimes [34] eat a bite, and I like to be at home once a day with my family, and as a rule would try to stay up. I have taken in very few shows—maybe once or twice a month. Several times I have had to leave a show on account of dizzy spells. Maybe I attend a P. T. A. meeting now and then, or possibly a lodge meeting, but most of my time has been spent at work or in bed, since I was in the Army. I feel that I have been getting worse since I was discharged from the Army. My nerves now are bad. I can't stand any sharp noises—can't stand it—I have just got to get away; it cuts into my chest like a knife—I just can't stand it. It has been that way most of the time; it gets worse right along. I have consulted almost continuously with doctors here in Billings, mostly Doctor Arnold while he was here, Dr. Feris Arnold, and

(Testimony of Carl R. Francis.)

Dr. Hanley. They told me I should not work. I have had to work. I have a bunch to keep and I am the only support. Since I got out of the Army and have been married, my income has not been large enough to support my family without work. I got married on August 10, 1920, while in vocational training. Yes, I have stepchildren. My wife had two children by a former marriage at the time I married her. I have supported them since my marriage. I have had five children since. They are from three to eighteen years of age, including the two stepchildren. The oldest girl is eighteen. Outside of my Government compensation and my wages I have had no income whatsoever. I did get a little money from my grandfather's estate at one time, about two years ago. My income has not been sufficient to support my family without working at any time since my marriage. That is the reason I forced myself to work.

Cross-examination
by Mr. Evans.

Yes, that is my signature on Exhibit C and on Exhibit D, and on Exhibit E and on Exhibit F, which is sworn to before Philip Savaresy, a Notary Public, in January of 1931. [35]

Mr. Evans. We offer these, not for any impeachment purposes at all, but simply to get the data more in tabulated form. It is simply the plaintiff's own admission of facts, and shows prac-

(Testimony of Carl R.Francis.)

tically identically the same work record that he had testified to on the stand. We offer Exhibits C. D. E. and F. for the files of the Court.

Mr. Smith. No objection.

Mr. Evans. I might call the attention of the jury to the fact that Exhibit C is a statement, signed by Carl R. Francis, dated May 7, 1919, to the effect that on April 30, 1919, the witness was a waiter at $2.14 2/10¢ per day, or about $65.00 a month and board, in the Wide-Awake Cafe, Fort Smith, Arkansas; next, Exhibit D, dated August 15, 1923, in which he states he worked as a waiter from Sept. 15, 1922, to December 1, 1922, at $85.00 per month, and as a waiter from December 15, 1922, to May 13, 1923, at $80.00 a month, and as a cook from May 27, 1923 to the present time, (August 15, 1923), no wages stated; and the next Exhibit is dated February 11, 1924, and is signed by Carl R. Francis, and additional statements, or practically the same statements as to his wife and children being dependent upon him, and their wages, etc.; Exhibit F is a sworn statement covering a resume of all of his employment since his discharge from the Army and up to the time of his affidavit in January, 1931. The real purpose of the Exhibits is to show, in writing, practically the same testimony as he has given on the stand. In other words, you have the figures and dates on these Exhibits for reference, rather than trying to trust back to memory as to his testimony.

EXHIBIT C.

C 132 785

EMPLOYMENT STATEMENT.

State of Arkansas,
County of Sebastin.—ss.

1. State your occupation and your average monthly earnings during the twelve months prior to entering the service: Culinary Worker
(Occupation)

$21.00 Per wk. & Board
(Monthly earnings)

2. State the exact date on which you first returned to work after discharge from the service and the monthly wages or earnings received: April 30, 1919 Waiter
$2.14 2/7 $64.24 6/7 $780.00 About $65.00 and
(day Month Year) Monthly pay or equiva-
Board
lent)

3. State the name and address of your first employer after your discharge from the service:
Prop. Wide Awake Cafe Ft. Smith, Ark.
(Name) (Address)

4. Have you stopped working in the place named above: No (a) If so give the date and the reason you stopped working: Will stop about 1st of next month for lighter work as this is too heavy.

5. State the name of your present employer, the date you started working for him and your monthly

wages: Prop. (Don't know name) Wide Awake Cafe. ABOUT $65.00 wages—April 30, 1919.

6. State fully every other position and employment you have had since your discharge from the service, stating date you went to work, date you stopped and monthly wages received: At home

(Employment)

X	X	None
(From)	(To)	(Wages)

7. Are you disabled for your former employment by any injury or disease received in the service: Yes (a) If so state just how Broken artery in left axilla shot through left chest.

I hereby certify to the truth of the foregoing statements.

Dated: May 17, 1919 Signature Carl R. Francis
Address Ft. Smith, Ark.
c/o Southern Hotel.

Sec. 25. That whoever in any claim for family allowance, compensation or insurance or in any document required by this Act or by regulation made under this Act, makes any statement of a material fact knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years or both.

C. C. Form 539. [36]

EXHIBIT D.

1. Have you been working since the date of your discharge? Yes.

2. If so, indicate in detail, kind of employment, dates of each and wages received.

(occupation)	(Commencing Date)	(Ending date)	(Monthly Wages)
Waiter	Sept. 15, 1922	Dec. 1, 1922	$85.
Waiter	Dec. 15, 1922	May 13, 1923	$80
Cook	May 27, 1923	to Present	

to the best of my memory.

3. Are you working at the present time? Yes.

4. If so, indicate kind of work, date of commencement. Cook —May 27, 1923.

5. Present employer E. Shellings (Full name) Shellings (Address) Cafe.

6. Have there been any changes during the past six months in the conditions regarding your dependents, such as death, divorce, separation from your wife or birth of children? Yes.

If your answer is "Yes," indicate changes in the following space: Birth of child born May 5, 1923.

I am now receiving compensation in the amount of $20.00 a month, including allowance for dependents. The following people are now dependent upon me and have been so ever since I submitted evidence of their dependency, and I contribute regularly to their support:

Name	Relationship	Age	Annual Income
Florence Francis	Wife	31	X
Dorothy Smith	Step-child	9	X
Meredith Smith	Step-child	6	X
Nella Francis	Child	2	X
Allie Cly Francis	Child	3 Mo.	X

I hereby certify to the truth of the foregoing statements.

Dated Aug. 15, 1923

Claim number C-132 785

Signature Carl R. Francis

Address 3916 3rd Ave. S.
Billings, Mont.

C-20 Rev. [37]

EXHIBIT E.

1. Have you been working since the date of your discharge? Yes.

2. If so, indicate in detail, kind of employment, dates of each and wages received.

(Occupation)	(Commencing date)	(Ending date)	Monthly wages)
Waiter	Dont know	at Ft. Smith, Ark.	60 dollars
"	Sept. 1st 1919	Feb. 5 1919	80 "
Rehabilitation (cook and waiter)	Feb. 8 1919	May 19, 1921	at govt. pay
Luzon & metropolitan	Sept. 15, 1921	Oct. 5, 1923	80 to 120 dollars

3. Are you working at the present time? Yes.

4. If so, indicate kind of work, date of commencement. Cook. Jan. 5, 1924 to present time.

5. Present employer.

A. M. Loomis (Full Name) Ferndale Cafe, Billings, Mont. (Address)

6. Have there been any changes during the past six months in the conditions regarding your dependents, such as death, divorce, separation from your wife or birth of children? No.

If your answer is "yes," indicate changes in the following space:

Have never been given dependency claim for Allie Cly Francis. Born May 19, 1923. Birth record was sent in several months ago.

I am now receiving compensation in the amount of $20 a month, including allowance for dependents. The following people are now dependent upon me and have been so ever since I submitted evidence of their dependency, and I contribute regularly to their support:

Name	Relationship	Age	Annual Income
Florence Francis	Wife	31	xxxxxx
Dorothy Smith	Step-child	10	xxxxxx
Meredith Smith	Step-child	7	xxxxxx
Nella Florence Francis	Daughter	2	xxxxxx
Allie Cly Francis	Daughter	9 Months	xxxxxx

I hereby certify to the truth of the foregoing statements.

Dated Feb. 11, 1924

Claim number C-132 785

Signature Carl R. Francis

Address Billings, Mont.

The above dates and wages are to the best of my memory.

C-20 Rev. [38]

EXHIBIT F.

United States Veterans Bureau
Adjudication Service
Form 535 Oct., 1929.

INDUSTRIAL HISTORY AFFIDAVIT (CLAIMANT)—INSURANCE.

In support of my claim for monthly payments of insurance, on account of permanent and total disability, I make the following statements as to my industrial history as true to the best of my knowledge and belief:

A—PRE-WAR OCCUPATIONAL STATEMENT

State your occupations and your average weekly earnings during the twenty-four months before entering the service. If you were at any time during these twenty-four months engaged in more than one occupation make separate statements in naming these occupations:

1. Occupation—Student.
   Employer's name and address:
   At home and in School, Western Business College, Shawnee, Okla.
   (If self-employed, write "self" in this space)
   From August, 1915 to January, 1916.
   Usual number of hours worked per day.....

Average weekly wage or earnings, $ none. Did you work steadily?.....

My duties in this occupation were Student.

2. Occupation Steel work.

Employer's name and address Reeves Brothers, near Cushion, Okla.

(If self-employed, write "self" in this space)

From February, 1916 to April, 1916.

Usual number of hours worked per day ten.

Average weekly wage or earnings, $5.00 per day. Did you work steadily? Yes.

My duties in this occupation were Steel construction work.

3. Occupation Farm and harvest hand.

Employer's name and address Mr. Michaelson, near Larnard, Kansas.

From May, 1916 to July, 1916.

Usual number of hours worked per day. From sunrise to sunset.

Average wage or earnings. $75.00 per month and board and room.

Did you work steadily? Yes.

My duties in this occupation were General farm and harvest work.

4. Occupation Farm and harvest hand.

Employer's name and address E. W. Arnold, near Larnard, Kans.

From August, 1916, through October, 1916.

Usual number of hours worked per day. From sunrise to sunset.

Average wage or earnings $5.00 per day and board and room.

Did you work steadily? Yes. My duties in this Occupation were? General farm work and harvest hand.

5. Occupation Cook and waiter.

Employer's name and address Coney Island Pool Hall, Tulsa, Okla.

From November 1916, through December, 1916. Usual number of hours worked per day ten hours per day Average wage or earnings $3.50 per day and board and room. Did you work steadily? Yes. My duties in this occupation were Working at lunch counter, waiter and cook.

6. Occupation Cook. Employer's name and address—Busy Bee Cafe, Eldorado, Kans., From January, 1917 through March, 1917.

Usual number of hours per day—ten.

Average wage or earnings $35.00 per week and board.

Did you work steadily? Yes. My duties in this occupation were—Cook. [39]

7. Occupation—Waiter and cook. Employer's name and address—Peterson's Cafe, Miles City, Montana, from April, 1917 to August 1917.

Usual number of hours worked per day—ten.

Average wage or earnings $35.00 per week and board.

Did you work steadily? Yes. My duties in this occupation were—waiter and cook.

B—POST-WAR OCCUPATIONAL STATEMENT.

1. What has been your occupation since your discharge from military service? Restaurant work.

2. Name and address of each employer and period of employment with each (If self-employed, write "self" in this space)

(a) Name and address of employer—Wide Awake Cafe, Forth Smith, Arkansas, from May 1st, 1919, to June 15th, 1919. Usual no. of hours per day—ten. Average wage—$10.00 per week. Duties—waiter.

(b) Name and address of employer—Albin Cafe, Cheyenne, Wyoming, worked five days in August, 1919. Usual No. of hours per day—ten. Average wage—$3.00 per day. Duties—cook and waiter.

(c) Name and address of employer—Jim Peterson's Cafe, Miles City, Montana. About three weeks in September and October, 1919. Usual No. of hours per day—ten. Average wage—$21.00 per week. Duties—cook and waiter.

(d) Name and address of employer—Ingham Cafe, Miles City, Montana. From about November 1st, 1919 to January 15th, 1920. Usual No. of hours per day—ten. Average wage—$21.00 per week. Duties—waiter.

(e) Entered vocational training, February 9th, 1920 to September 1st, 1922.

(f) Name and address of employer—Shelling's Cafe, Billings, Montana, December, 1922 and Jan-

uary, 1923. Usual No. of hours per day—ten. Average wage—$25.00 per week. Duties—cook.

(g) Name and address of employer—Luzon Cafe, Billings, Montana, August, 1923 to September 30th, 1923. Usual No. of hours per day—ten. Average wage—$21.00 per week. Duties—waiter.

(h) Name and address of employer—Ferndale Cafe, Billings, Montana, from January 3rd, 1924, to August 6th, 1926. Usual No. of hours per day—ten. Average wage—$32.50 per week. Duties—Cook.

(i) Name and address of employer—Metropolitan Cafe, Billings, Montana, from September 10th, 1926, to September 20th, 1926. Usual No. of hours per day—ten. Average wage—$21.00 per week. Duties—worked in Kitchen.

(j) Name and address of employer—New Bungalow Cafe, Billings, Montana, from September 21st, 1926 to October 30th, 1926. Usual No. of hours per day—ten. Average wage—$32.50 per week. Duties—cook.

(k) Name and address of employer—Northern Hotel, Billings, Montana, from March 17th, 1927 to May 24th, 1927. Usual No. of hours per day—ten. Average wage ..... Duties—Cook.

(l) Name and address of employer—Ferndale Cafe, Billings, Montana, July 11th, 1927 to present time. Usual No. of hours, ten. Average wage—$32.50 per week. Duties—cook.

3. Usual number of hours worked per day ..... average weekly wage ..... [40]

4. Has your physical condition been responsible for loss of time from employment? Yes. If so, to what extent? Explain Been able to work about half time on account of physical condition.

5. Have you been able to do your full share of work and compete with men employed in the same occupation? No. If not, state reasons which permitted your retention in employment—Kept on through sympathy and the fact that I was an ex-soldier.

6. If self employed furnish the names and addresses to two or more disinterested persons who have knowledge of the facts:

Not self-employed.

7. I make the foregoing statements with full knowledge of the penalty provided for making a false statement as to a material fact in a claim for insurance.

State of Montana,
County of Yellowstone.—ss.

S/ Carl R. Francis,
(Signature of affiant)
319 N. 23. Billings, Mont.
(Address of affiant)

Subscribed and sworn to before me this 20th day of January, A. D. 1931.

[Seal] S/ PHILIP (?)
(Signature of officer administering oath)
Notary Public for the State of Montana, residing at Billings, Montana.

My commission expires November 17, 1933.

PENALTY—That whoever in any claim for compensation, insurance or maintenance and support allowance, or in any document required by this Act, or by regulation made under this Act, makes any sworn statement of a material fact knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both. (Sec. 501, World War Veterans Act, 1924.) [41]

(Testimony of Carl R. Francis.)

(Plaintiff continuing). When I got out of the Army, in December, [42] or about the 1st of January, 1919, I went to my father's home. He lived at that time at Walls, Oklahoma. I was there about six months, but I was not in Walls during

(Testimony of Carl R. Francis.)

all that time. My father moved a short time after to Talihina, Oklahoma.

The first work I did was along in April of that year in Arkansas. I imagine that is right, that I worked a total of about 4½ months during the year 1919. I wouldn't know exactly. I was off seven months and that included the first four that I was out of the Army—in other words, after I started to work the first of May, I lost about three months and worked about four and one-half or five months. That is approximately correct. I was working in 1920 at the time I went into Vocational Training and I only worked a short time and a period in between that time.

I went to Bozeman on or about February 9, 1920, and remained in training during that year.

To go back to 1919, if I remember, I got about $10.00 or $12.00 a week while in Arkansas, and a few days at Cheyenne, Wyoming at about $3.50 per day—the best I can remember. Yes, sir, that is about right, that in that five months I earned about $350.00 and my board. In 1920 I received a maintenance allowance from the Government while in Vocational Training. Up until the time I was married that was $80.00 per month—that is, while I was in Vocational Training. I received $80.00 a month from February 9th until in August, when I was married. After I was married I don't remember my rate of pay; it was $100.00, I imagine, possibly $115.00. If the records show that on Au-

(Testimony of Carl R. Francis.)

gust 10th I began to receive $152.50 a month as training pay, that is correct. I don't remember. I received $80.00 for about six months and $152.50 or approximately about $1400.00 in 1920 as maintenance allowance.

In 1921 I lost some time from my training—such time as I lost from sickness and in changing vocational objectives and finding places for me. That is while I was in training. I [43] did not suffer any deduction from this vocational allowance. The pay was fixed. I was not in the hospital during any of that time. I was at home sick in bed a few days at a time, and probably as high as a week or more. Yes, that is about right if your figures suggest that I earned about $1890.00, or rather, there was paid to me about $1890.00 during 1921 as training pay.

In 1922 I testified I left vocational training and began work. I was at the Luzon Cafe a short time and the wages were $21.00 a week. At Shelling's the wages were $25.00 a week. If I made a statement that I received $35.00 a week at the Luzon, together with my tips, while a waiter there, I don't remember it. In fact, I know I didn't. I may have made a statement to the training officers to the effect that I preferred to return to the occupation of waiter, rather than cook; I don't remember. Although trained as a cook, I did take the occupation of waiter at the Luzon Cafe at that time because I took what I could get at that time. That is

(Testimony of Carl R. Francis.)

probably correct that with my wages and training pay in 1922 I earned about $1800.00. While I was in training, however, I didn't receive any pay except from the Government.

In 1923, the year after I was out of training, I don't believe I did anything; I can't remember of anything, unless possibly a day or two from place to place. I did not take any trips that I remember, or anything of that sort. I believe I made one trip into Wyoming, I think for two or three weeks, something like that. I don't remember that I worked more than two months during that year. If I did, if you will mention something to recall it to my mind—the best I can remember is that I worked only at the Luzon a short time—a part of August and September—I imagine through Fair time—just through Fair time. I was not in the hospital at any time during 1923. I have been sick and at home quite a bit of the time. I do not recall any definite times in 1923 when any doctors treated me while laid up at home, but I was to see doctors pretty nearly continuously; that is, maybe once or [44] twice a week, or maybe once every two weeks during that time. I couldn't tell you what I earned in 1923—not very much, about $125.00 a month in those two months I imagine. I think $250.00 for my earnings that year would be about right. During this period, while in training, I was receiving compensation, and while not in training, just that fixed by the Compensation

(Testimony of Carl R. Francis.)

Board. This compensation was paid to me by the Government on account of gunshot wound which I suffered.

In 1924, January 3rd, I started working for the Ferndale Cafe, and I earned $32.50 a week at that time. My duty was that of chef and cook. I worked the full twelve months of 1924 for the Ferndale outside of possibly a few days. In 1924 I earned about $1825.00 for that twelve-months' work, that is approximately correct, and in 1925 I worked all through 1925, and I should judge earned about $1825.00 during that year.

In 1926 I left the Ferndale, having worked there about nine months—I don't know the exact number of months—about eight or nine months. I was off then for three months in 1926, and I earned about $1200.00 during 1926. To the best of my recollection during those three months I was not working I was in Billings. Before I left there, I made a trip to Red Lodge, with the Y. M. C. A. boys and spent ten days with the boys and was laid up for about two weeks afterward, but that was before I was discharged from the Ferndale. In 1926 I believe I was at the New Bungalow and it was the New Bungalow that built higher tables for me.

If the records show that I worked about eight months and was off about four, and computation of wages would indicate that I earned about $1100.00 in 1927, that is about correct, if that is

(Testimony of Carl R. Francis.)

my testimony. I was at the Northern Hotel in 1927 and my wages were $110.00 or maybe $120.00 a month. I am not sure. I believe that Mr. Shea's records show $110.00. I was under the impression it was $120.00.

Beginning in 1927, in July, on July 11th, I went back to the Ferndale Cafe again. My wages there were the same as [45] before, $32.50 a week. As a chef, I was responsible for all the twenty-four hours, but I usually worked from six or seven o'clock of a morning until three in the evening. If I wasn't through, I had to stay later. That made about a ten-hour day unless I could cut it down by having things in shape to do so. During 1927, 1928, 1929 and 1930 I made approximately $1685.00 a year. I did not have much time off during those years, only at times, without I would be sick maybe. Of course I don't know how often that would be, and in the afternoon, if I would give out and some one was available at all, I would pay them myself, so that I could go home. That would happen quite often, when I didn't feel well. There were no deductions from the pay. I would have no way of getting at how much I paid out in that manner. I have witnesses who can testify they substituted for me. I can't say as to how much time they can testify to; I don't know. It was just when I felt bad and some one would be there. Often I just had to stick it out the best I could. I would say that I hired a substitute for as much as a month of the whole year,

(Testimony of Carl R. Francis.)

because I usually had to give them from a dollar to two dollars, or possibly three—very often two dollars for an afternoon, to finish up. I can possibly name any number whom I hired for that purpose. Their present cook there now, he has served a number of time. His name is Charlie Keyes. I have no way of knowing how much time I paid for out of my own pocket for help during that three years. I haven't any definite figures on it.

I have not been treated by any doctors during the past four or five years, but I go to them to see what can be done. The doctors were Dr. Arnold, as long as he was here, and Dr. Hanley here, that is outside of Federal doctors and the regular Board. the routine that you go through, and dentists if you want to take them in. In the twelve years from the time I got out of the Army until a year ago I would say I spent four or five months in a hospital or in bed, laid up, on account of my disabilities—possibly three or four in the [46] hospital, but I spent a great deal of time in bed at home. I couldn't say how much of that time I spent in bed at home was twenty-four hours at a stretch, but when I get off shift, I go home and to bed, unless there is something I must stay up for. I don't undress and lay down for two or three hours; I nearly always go to bed. I can just guess at how much time in bed during the working hours I spent confined in bed, so that I was unable to go to work at all. I would say during the time I was at the hospital, six or

(Testimony of Carl R. Francis.)

eight months. That is a guess now. I never gave it any thought. I wouldn't know how to get at that.

Q. I have computed that in that twelve years, you lost a total of 25 months' time, and according to your testimony, that you had spent possibly five or six months of that 25 months in bed. Is that about correct?

A. Possibly. I had never given it any thought and can't say positively. I could say better if I could check it over. That is my estimate according to the reference you have.

Q. Now then, I compute that during that twelve years, you worked practically ten years of that time, or one month less than ten years of the twelve, assuming that you lost twenty-five months' time from your work in the twelve years, and that that included the time you were in vocational training, and that you attended the job more or less regularly, and the total earnings, I compute, would be between $15,000.00 and $16,000.00 that you earned, and that includes the $1890.00 a year that you received as vocational training pay. Would that be approximately correct for the twelve years?

A. Yes.

(Plaintiff continuing): I have been examined by doctors of the United States Veterans Bureau at times, so many times that I can't remember. It has been a continuous thing until I was put on a permanent list. It is customary to examine me every year or two, to determine the degree of my disa-

(Testimony of Carl R. Francis.)
bility, for compensation purposes. I haven't been called in now for two or three [47] years I guess.

Before I went into the Army I had been in school, and I worked in a hotel for my board while in school, and when I got through school, I could earn more by taking the job of second cook, in the place where I was working for my board, so I did that. In January to March, 1917, and in April to August, 1917, before I went into the Army, I worked at $35.00 a week as a cook, in Miles City and El Dorado, Kansas, so that just before I went into the Army I was a cook, earning $35.00 a week at that time. I wasn't very old and I had done a lot of different things. I followed the oil fields and the harvest fields.

I do not claim to have paid any premiums on my insurance after the premium for March, 1919, was due. Unless my permanent total disability at this time is directly caused from injuries received while the insurance was in effect I admit that the insurance lapsed.

I said that Dr. Feris Arnold and Dr. Hanley treated me and advised me. They told me that I couldn't work, that it would be dangerous to my life or health to do so—that I shouldn't work. I don't know any reason for that advice.—on account of my health, nervous condition, and such like. They don't usually tell me anything much; they just tell you what you should do, or possibly give you a prescription to have filled and tell you how to take it.

(Testimony of Carl R. Francis.)

While I was in vocational training in Billings I believe was the first doctor I saw, outside of the board doctors. I was called in as a regular at that time, while I was in training, and Dr. Arnold was the first doctor I had in Billings, and possibly a dentist. Dr. Hanley advised me also in that fashion. I don't remember any others.

Redirect Examination
by Mr. Smith.

At the time when I first found out I was wounded, there was not a whole lot of outside bleeding. My hand was [48] wet after I put it inside my shirt, and I spit some blood—not until after the infection set in, and the blood vessels got so weak that one of them broke, and the boys—that is the boys in the ward—told me that when I was on the table they pulled this vessel out and tied it with cat gut, each end. The orderlies in the hospital told me. At the time of being wounded, there was not a whole lot of outside bleeding. I spit blood, and I was weak, awfully weak. I lost the use of my side; I couldn't raise my arm, and they sent me back, and I thought I would be all right, and by the time they had me back I was all in at the dressing station. A great part of the time I was in the hospital I spit blood, until I came to the States. I don't remember any after coming from Des Moines. I testified this morning that there was pus in this wound. It seems to me like it continued the full

(Testimony of Mrs. Carl R. Francis.)
time until after I came back to the States. It continued until about two, three, or four months before I was discharged. The wounds really didn't close until about the time I was discharged. I believe I landed in October of 1918 at Newport News, Virginia, and then I went to Des Moines, Iowa. It must have been about a month that I was in the States before I was discharged because that was in November, and I was discharged in December,—about a month and a half. I do not have the full use of my left arm at the present time. It is not possible for me to raise it as high as the other one. I haven't the full use of it. (Witness stands and shows how far he can raise arm.) It hurts in here (indicating).

Q. Can you touch the top of your head with that arm?

(Witness attempts to, but cannot.)

Mr. EVANS.—Mr. Francis, will you just put both arms up, for comparison purposes. (Witness complies with request.) [49]

TESTIMONY OF MRS. CARL R. FRANCIS

on behalf of the plaintiff:

I am Mrs. Francis, the wife of the plaintiff. We were married in Minneapolis on August 10, 1920. I had two children at that time. Mr. Francis and I have had five children since then. I have been

(Testimony of Mrs. Carl R. Francis.)

with Carl practically all the time since our marriage. I haven't been down at places where he worked. My association with him has been in our own home. In the evenings when he comes home from work he is always dreadfully tired and worn out. This has continued pretty much all the time since our marriage. As soon as he would come home he would usually go and lay down. That was his regular habit. He would lie around that way perhaps an hour. The rest of the evening maybe he would get up and read the paper and perhaps he wouldn't even do that. He usually retired about 8:30, and he would stay in bed until the next morning.

We don't go out a great deal, perhaps to a moving picture show every two weeks.

Yes, I do know that he had pains and catches in different parts of his body. I know he gets a catch in his side. His left arm bothers him. I can't say exactly how often he would be troubled with the pain in his left side. Sometimes every few days and sometimes two or three times during the day, and then again maybe it won't come on for weeks. He has suffered from this ever since our marriage, and he is worse now than when we were first married. He usually goes to pieces when he gets this pain in his side. I am so frightened, I can hardly explain. It seems as though his heart stops beating for a minute or two. When he gets this pain, he always likes to lie on his stomach. It would seem

(Testimony of Mrs. Carl R. Francis.)

as though it would just be a few minutes until he got some relief, but it would be an hour before he would be able to get up. He has never done any work around the house. He isn't able to do it and so I don't ask him. I have wanted to call a doctor when he has had these pains or spells, but he would say it would be gone by the time [50] the doctor arrived. I have urged him to quit work and he would reply that he can't. He feels that he must work to support the family. When he has these pains in the side and lies down, I really think he knows what is going on, but seems to be in a kind of daze.

Mr. EVANS.—No cross-examination.

TESTIMONY OF EDWARD M. SHELLING

on behalf of the plaintiff:

My name is Edward M. Shelling. I am a resident of Billings. I am acquainted with Carl Francis. He worked for about two months. He testified he worked for me in December, 1922 and January, 1923, and that coincides with my recollection. I was running a restaurant at that time. He was fry cook for me. He was a very willing worker.

During the first week I didn't know there was anything wrong with him, but after a while I

(Testimony of Edward M. Shelling.)
thought he was beginning to slack up, and I asked him about it, and he said he wasn't feeling his best. At night he was supposed to clean up and take the dinner things off—certain amount of cleaning up to do, and he had to call on the dishwasher in order to get through. That was a portion of his work. He told me about not being able to lift anything heavy the second or third day after he came. He was supposed to lift a heavy sack and wasn't able to do it. After that I always had a man to help him.

Yes, I noted a difference between the time when he first went to work and after he had been on the job several hours. In the afternoon I wouldn't be there and there was a lot for him to do. At supper time he was supposed to have the range, and I always helped him. I didn't notice that there was anything the matter with him, but one day he said, "I am not feeling good." I didn't know he was hurt, thought maybe he was just feeling rather sick. Whenever we had a big crowd, he would almost pass out. We would have to help him to the door [51] and then after he had revived, he would get along pretty good. During this time I would do his work. Eventually I had to let him go, as I was trying to turn out the pastry and it took too much of my time to help him, and I thought there was no use fooling with him, that I might just as well get a man who could do the work.

I have been a restaurant man forty years.

(Testimony of Edward M. Shelling.)

At times this man was just as good as anybody, but if a big crowd happened to come in, he would be all in. He couldn't handle it. No, I wouldn't figure he was capable of handling the job by himself.

Cross-examination
by Mr. Evans.

Mr. Francis worked for me during the month of January, 1923, and probably before Christmas of 1922. He worked almost two months—I couldn't say exactly. I knew of him between February, 1923 and August, 1923. I saw him. He was around town. I think he worked a week at the Metropolitan. I think that is where he worked Fair week. What he did the other times I don't know. That was when I found out he got compensation. I didn't see how he could support a family otherwise. I paid him small wages. Once when I met him, I asked him if he had a job, and he said: "I would not be able to hold a job if I had it." I have known him since then all the time. I don't know about his being better or worse than since or before 1923. He doesn't seem to be able to hold a job since he worked for Mr. Loomis.

I saw him in the Ferndale. He had had several afternoons off because he wasn't feeling good. The testimony was that he worked for several years there and I observed him during those years. Some of the employees that worked for the Ferndale

(Testimony of Edward M. Shelling.)
worked for me afterwards, and I asked them how Francis was getting along, and they said: "When he's all right, he is all right, [52] but when he has those sick spells, he's good for nothing." I can't say that there is much difference between his condition in 1923 or 1928 to 1929. I noticed a big difference between the first and last few weeks that he worked for me. I wouldn't have kept him but for his family. Mr. Francis didn't tell me he was a discharged soldier.

TESTIMONY OF FRANK LARSON

on behalf of the plaintiff:

My name is Frank Larson. I was the manager of the New Bungalow Cafe in the fall of 1926. I am acquainted with Mr. Francis. He worked for me in the fall of 1926, about five or six weeks I should judge. He was a good cook and he knew his business.

I don't remember exactly what Mr. Francis' shift was when he worked for me, but from around six to seven in the morning he went to work, or a little before that, and worked until about one, and then from about nine to ten in the evening. When he first came to work in the morning, you wouldn't want a better man; later on, when he got tired, you would think he would die on the job, until along about seven or eight, he wasn't able to keep track of the orders, and a cook wouldn't last very long in

(Testimony of Frank Larson.)

any kind of a restaurant if he couldn't keep track of his orders. I didn't notice anything else along this line. The main thing I wanted was to have him get his orders out. He was there about six weeks and then I had to turn him loose. He couldn't handle the job.

I have been in the restaurant business, with the exception of three months, for twenty-five years. I would say this man was able to handle the job for about an hour all right. He was not capable of handling the job for the ordinary shift that was required of him in our place.

Mr. EVANS.—No cross-examination. [53]

The COURT.—Do you mean he was not physically able to take care of the orders? Do you mean that because of his condition physically, he seemed to die on the job?

WITNESS.—I mean that at first he was all right, but was worn out after he had been there an hour or so.

TESTIMONY OF T. C. PETERSON

on behalf of the plaintiff:

My name is T. C. Peterson. I am acquainted with Mr. Francis. I was in charge of the Northern Hotel kitchen between March 17, 1927, and May

(Testimony of T. C. Peterson.)

24, 1927. Mr. Francis worked for me at that time about two months. He was working under me. He worked on the same shift with me.

During the time he was there I knew he had dizzy or fainting spells. About the first three days he was there, he had a fainting spell. I helped him out to get some fresh air, and probably five or six times during the first two months he was there he had to go out to get fresh air. The last night he was there, I had to carry him to the door. He just fainted, and I had to carry him out to the door. When he had these fainting spells it would be about two hours before he could come back on the job. The last time he never did come back on the job. I got a taxi and sent him home, and the next morning he didn't show up. We had a banquet on at the time. There was some extra work at the time. With reference to Mr. Francis' ability to lift some of the pots and other things he had to lift as a cook, he was useless—couldn't do it. We always had two extra cooks who would take care of that.

When he left there as far as I know he went to the hospital at Helena.

While in my employ he was not ever able to perform the duties of his position. I kept him on as long as I did because his knowledge in the kitchen was pretty good, and we couldn't get a man who would get out and take care of the [54] orders—I mean cook the orders correct. We had to get along with him as long as we could. It was just due

(Testimony of T. C. Peterson.)
to the fact that I couldn't get any one to take the job. I never took him back when he came back from the hospital.

Cross-examination
by Mr. Evans.

It was sometime in March, 1927, when he first came to work for me, and it was probably May when he left. It was about two months. I was the head chef myself. I was drawing $120.00. I had one or two other cooks. We paid one $120.00, one $110.00 and one $80.00. I paid Francis $110.00. The one I paid only $80.00 was a pastry cook, and he got only $80.00.

As far as I know when Francis finally left my employment he went to the hospital at Helena. These spells I testified to were regular throughout his whole employment. I couldn't say whether they seemed to get better or worse as the employment continued. He had one when he started and one the last night he was there and some in between, so I couldn't say. When he left he was sick enough to go to a hospital and I don't know where else he could have gone.

TESTIMONY OF JAMES BUCKLEY,

on behalf of the plaintiff:

My name is James Buckley and I reside here in Billings. I am acquainted with Carl Francis. I have known him about nine years, a little over. I have worked with Mr. Francis several times.

The first time I worked with him at the Ferndale Cafe, that is here in Billings. I went to work there in May, 1925, and worked there until April, 1926, about 11 months. Mr. Francis was working there during that time. He was chef. I was washing dishes. We worked on the same shift part of the time. While he was acting as a chef he was able to perform his duties, but as a cook, he did not. He couldn't do the [55] lifting, and would get weak spells or fainting spells, etc. and would have to go back and sit down, and when I was on the shift with him, I would hold up his end until he came back. As a cook he was supposed to lift large pots, and there were sacks of flour to be emptied, and such like. I don't know about quantities; they didn't buy in such large quantities. I did the heavy lifting while on shift. That was not part of my job, but was really the cook's job.

Referring to the spells, I wouldn't say he fainted or went clear out. If the work was a little too heavy, he just went back and sat down and stayed until—I couldn't say exactly the period—sometimes a few minutes and sometimes longer, and then he would take up the work again. I don't know a thing about how often they would come on him—

(Testimony of James Buckley.)
maybe every four or five days or a week, and often sometimes for several days he had them right along. There was no set time during the day when they would come on—well, maybe in the middle of the morning, after the work got a little heavy. I would do his work during the time he would be sitting down. I jumped in and did it, but that was not part of my duties. I did it because Carl needed the work; he was a good fellow and he had a family, and he needed to do it to keep his family going.

I worked with him at a later time. I came back there in 1930, from Great Falls, and went to work there at the Ferndale again from June, 1930, to January, 1931. Mr. Francis was working there at that time. I did not work on the same shift with him at that time. I worked from 11 to 7 and Carl came on at 6. I would be there an hour in the morning with him. He never did any lifting. We didn't expect him to. Everybody did the lifting for him. It was just everybody's work. I always did make a special effort to do this work before I would leave, and everybody who worked that shift did. If there were any stocks to put away, I always did it, so Carl wouldn't have to do it. It was usually left to the day man. [56] His condition was worse from the first time I worked with him.

After I left there in January, 1931, I worked with Carl Francis down to the sugar factory. That was during the sugar campaign, this last fall. We

(Testimony of James Buckley.)
started in together and worked that way for about six weeks and then I sold out my share and worked for wages. We worked as partners. While Carl was on the job I did all the heavy lifting. I never saw him have a fainting spell, but one, and that was the worst one ever. We were fixing the stove and he started to lift it and he fell down. He fell back and sat down there, must have been forty-five minutes or an hour, back on a box. He doesn't make any complaint. I never asked him any questions because I knew his condition.

I have worked around restaurants eleven years. I would say that any time I worked with Carl that he was not able to perform the duties of a cook without having some one help him.

Cross-examination
by Mr. Evans.

Mr. A. M. Loomis is the proprietor of the Ferndale and he is in Billings at this time. He works in the front end of the cafe. During the time Francis and I were working there, he worked at the table in the front. He had the whole supervision of his help, could see what was going on at all times. I never heard Mr. Loomis find fault with the work of Mr. Francis, and Francis was working there before I came to work and after I left there.

TESTIMONY OF MRS. VELMA DUGAN

on behalf of the plaintiff:

My name is Mrs. Velma Dugan and I reside here in Billings. I know Carl Francis and have for about ten years. I worked with him at two different places, first at Shellings, who testified here. It was during the period Mr. Shelling testified to. Carl was cooking there at that time. I was waiting table. I noticed [57] the way he was able to do his work as cook there. Part of the time he did it alright, but he couldn't remember his orders. He couldn't remember more than two or three orders at a time, and there were several of us girls on at the time. It was impossible for him to lift up any platters, and there is lots to do. He couldn't do any of the heavy lifting. Bennie Peyton, the dish-washer, did most of that for him. The heat certainly did affect him. For about two hours he would be all right and then he would be all in, could hardly finish the afternoon. I have seen him lots of times in fainting spells, and he would either go to the door or lay down on the meat block. These spells would continue sometimes fifteen minutes or half an hour. Anyone who had an order at such times would go out and fix it ourselves. These spells seemed to come during the heat or a rush. He couldn't stand that. I worked with him the next spring at the Ferndale, the spring of 1924. We worked together down there four or five months. His condition at the Ferndale compared to at Shelling's was lots worse. We all helped him

(Testimony of Mrs. Velma Dugan.)
with his work down there. We cooked lots of orders for him that he should have done. He would probably be sitting down and resting, and I would go and cook the order myself. He couldn't do the heavy lifting, same as at Shelling's. It seemed that he had spells lots oftener than at Shelling's. It was not part of my duty to go into the kitchen and cook.

Cross-examination
by Mr. Evans.

I never heard of Mr. Loomis complaining of his work. He did continue to work there after I left. Mr. Loomis is in town now.

TESTIMONY OF MRS. FLORA SUMMERS

on behalf of the plaintiff:

I am Mrs. Flora Summers and I am acquainted with Mr. Francis. I have known him about seven years. I have worked at the same place that Mr. Francis has at the Ferndale Cafe [58] for about four years. It has been testified to that he worked there on two different occasions and I worked there both times and I was there when he worked there the last time. I was on the same shift that he was. I observed that he couldn't lift heavy pots and weights at all. I have helped him myself. Whenever he thought I couldn't help him he would leave

(Testimony of Mrs. Flora Summers.)
it for the next party. We generally had a man working there in the afternoon. I was washing dishes. I remember that Mr. Francis had trouble about forgetting orders. He complained quite a bit about being sick and having to rest until he got better. That would be quite often. When that came on I would do what I could until he got to feeling better and could do it himself.

Cross-examination
by Mr. Evans.

Mr. Loomis was the proprietor of the Ferndale Cafe. He is in town now. I never heard him complain of Mr. Francis' work. They never discussed that with the help.

TESTIMONY OF J. H. DANIELS

one behalf of the plaintiff:

My name is J. H. Daniels and I am Secretary of the Cooks and Waiters Union here. I have had that position since August, 1918. I know Mr. Francis and have since March, 1921. I have had occasion to observe Carl's work since 1921. I would go around at places perhaps once a week and see him working when he was on the job. It was one of my duties as Secretary to go around. I have quite often observed his manner of doing his work on these visits. I have noticed that the assistants,

(Testimony of J. H. Daniels.)
such as dishwashers, would have to help him with his work, and with lifting, such as that, and I would probably remain there ten or fifteen minutes sometimes, and I would notice that he couldn't remember orders very well. I have had several jobs for him in the last year, but couldn't keep him on them. It seems he wasn't able to handle them since leaving the Ferndale. I knew about him when he was working at the Luzon and the Metropolitan, and I wouldn't recommend [59] him for those places—the work is too heavy for him. The work at the Ferndale is an easier place to work. There are not so many orders coming in there. It is not as large as the other places, considered what you might call a smaller job. I would state that I have tried to put him to work at Byron's Cafe, and I went to Mr. Byron when Carl wasn't working and told Mr. Byron just his condition, that he wasn't very strong, but Byron said that he would cut the meat and do the heavy work of the kitchen and he would probably be able to hold the job in that way, and he worked a couple of days there and finally Byron went on a trip to Bozeman and left Carl alone and the work was too much for him.

Q. Mr. Daniels, will you give the reason why Carl was able to hold the job at the Ferndale and not at the Byron Cafe and the other places he was obliged to leave?

Mr. EVANS.—Objected to as not the best evidence—calls for conclusion of the witness.

(Testimony of J. H. Daniels.)

The COURT.—He has already said it was a much easier place to work and has covered it now.

Mr. SMITH. All right. That is all.

Cross-examination
by Mr. Evans.

Yes, I did say I was Secretary of the Union and in that position it is my duty to find jobs and place a man at work.

Mr. SMITH.—At this time we wish to offer the deposition of Ferris Arnold, whose deposition was taken on stipulation of counsel. Do you wish to look it over, Mr. Evans?

Mr. EVANS.—No, you may read it and it will be all right, or perhaps I had better ask the questions and you may read the answers from the deposition. [60]

DEPOSITION OF DR. FERRIS ARNOLD

read on behalf of the plaintiff:

My name is Ferris L. Arnold, age 39, address Long Beach, California. I am a Doctor of Medicine. I am a Medical Doctor, a graduate of Loyola University, Chicago, 1915 and have an M. D. degree. I am licensed to practice my profession in the States of Illinois, Montana and California. I practiced from 1915 to 1926 at Billings, Montana, in

(Deposition of Dr. Ferris Arnold.)

general practice; from 1926 to 1928 at Chicago, Illinois, eye, ear nose and throat; from 1928 to 1932 at Long Beach, California, Eye, Ear, Nose and Throat.

I am acquainted with Carl R. Francis, the plaintiff, and he consulted with me professionally at Billings, Montana, in 1921 to 1926. These consultations consisted of frequent office consultations and examinations, also house calls and consultations. These consultations and physical examinations of Carl R. Francis were of such a nature that I was familiar with his physical, mental and nervous condition during all the period of my consultations as above stated. Referring to the first consultations in 1921 they did include an examination of the said Carl R. Francis to ascertain his physical, mental and nervous condition, and my diagnoses were: 1. Chronic myocarditis; 2. Enlargement of Heart; 3. Chronic Nephritis; 4. Chronic respiratory infection; 5. Neurosis and extreme mental despondency; shortness of breath, pulse 120, 140 on exertion, low specific gravity urine; rales in chest. Casts and albumen in urine. Chronic cough, temperature from 100 to 103; weakness and inability to do his work. After his first consultation in 1921 Carl R. Francis consulted me frequently, sometimes daily for weeks at a time. These consultations subsequent to 1921 were all of such a nature and character that I was familiar with his physical, mental and nervous condition at all times up to my last consultation in 1926.

(Deposition of Dr. Ferris Arnold.)

Up to the time of the last consultation in 1926 his mental condition grew worse, felt as if he could never work or get well again. Physical condition grew worse, was [61] unable to work for long periods of time because of weakness.

From my consultations with and examinations of Carl R. Francis I did form an opinion as to the cause of his condition as heretofore testified to, and that opinion is that he had a severe injury and shock during the war, together with exposure and extreme fatigue which brought on his physical infirmities and caused him to become a psycho-neurotic. In my opinion the physical, mental and nervous condition which I have heretofore described dated back to the time that Carl R. Francis was wounded in action in France. I consider that he was permanently and totally disabled in accordance with the Treasury Department definition as read to me at the time of my first examination and consultations in 1921, said Treasury Department definition of total and permanent disability being "any impairment of mind or body which renders it impossible for the insured to follow continuously, any substantially gainful occupation without seriously impairing his health, and when it is of such a nature as to render it reasonably certain that it will continue through the life time of the insured." In my opinion such total and permanent disability dated back to the date that Carl R. Francis was wounded in action. In my opinion such total and permanent disability continued to the time of my

(Deposition of Dr. Ferris Arnold.)
last consultation with Carl R. Francis in 1926. In my opinion it will continue throughout the lifetime of said Carl R. Francis. I know that Carl R. Francis worked and followed an occupation as restaurant cook during the years he was under my care and observation. This work without question had a tendency to further impair the health of Carl R. Francis from the condition which he had at my first consultation with him in 1921. He was in no fit condition to work at all because of his poor physical condition.

CROSS INTERROGATORIES

propounded to Ferris Arnold:

I have no office records of my examination and treatment of Carl R. Francis. My advice to him at the various consultations with him as to the effect upon his general health and the effect upon his special disability of his following the occupations of cook or waiter was not to work if he could possibly avoid it. He worked at times as he had to have food for his family. The following of the [62] occupation of cook and waiter increased his poor physical condition. That is, made it worse.

Q. If you have answered that in your opinion Carl R. Francis was totally and permanently disabled in 1921 in accordance with the definition as set forth in Interrogatory No. 17, will you state exactly what impairment of mind or body rendered it impossible for Carl R. Francis to follow the oc-

(Deposition of Dr. Ferris Arnold.)

cupation of cook or waiter, and how you can reach the conclusion that such impairment of mind or body would make it impossible when in fact your testimony shows that it was not only possible, but that he did in fact follow the occupation of cook and waiter during the period he was under your observation?

A. The heart, kidney and chest condition was such that he might have died while at work. His love for family and the need to furnish food for them caused him to tax himself to the utmost to work for them, even though he was unable to properly do so.

TESTIMONY OF ROBERT J. HANLEY

on behalf of the plaintiff:

My name is Robert J. Hanley and I reside here in Billings. By occupation I am physician and surgeon and I have lived in Billings fifteen years. I graduated from a medical school or college in 1914 and since have been engaged in the practice of my profession in Montana and Wyoming and am licensed to practice in both states.

I am acquainted with Carl R. Francis and have known him since 1926. He had occasion to consult me professionally in 1926 after Dr. Arnold had left Billings. I have had consultations with Mr. Francis from 1926 up to the present time. Occasionally from 1926 up to this time I have made physical

(Testimony of Robert J. Hanley.)

examinations of him. I examined him last fall and also this week. The purpose of these examinations was to ascertain his general physical condition and to see if I could do him any good. I first went into the history of his case, and from the information received as to the history of his case and the [63] physical examinations made of him I was in a position in 1926 to form an opinion as to his physical, mental and nervous condition. When he first came in, I was the Eagles's physician here, and he was a member of the Eagles before he went to War, and he came in suffering from a chest condition. He had severe cold and neuralgia all through his left lung and right lung. The pulse was fast and running a slight temperature at that time. His urine contained casts, some albumin, and low specific gravity, and he had several deep scars on his left chest in the axillary region, at the tip of the left scapula. His pulse was fast—the quality of the pulse was not strong. His heart was—the sounds were weak, and the inspiration was shallow over the lungs, and he was in a generally run-down condition and emaciated. I have testified as to the condition of his heart. I have not noted any changes in his condition particularly, since then. At present he looks better than he ever has at any time I have been taking care of him. He says he has not been working this winter. Rest will help to make his condition better than when working. At that time he claimed to be nervous and

(Testimony of Robert J. Hanley.)

irritable, and he also gave a history of being very nervous if somebody would make a sudden noise behind him or where he couldn't see what was happening. His condition most likely came from the original injury, the chest injury. If you have an object driven through your lung, there is bound to be an after effect, depending entirely upon the amount of the wound, severity, and the infection which occurs at the time of injury. I mean by this chest injury the wound he received in action. I believe that he was permanently and totally disabled in accordance with the Treasury definition at the time of my examination in 1926, said Treasury Department definition of total and permanent disability, being "any impairment of mind or body which renders it impossible for the insured to follow continuously any substantial gainful occupation without seriously impairing his health, and when it is of such a nature as to render it reasonably certain that it will continue through the lifetime of the insured." Most likely the disability was incurred at the time he was injured in action. In my opinion I don't look for any improvement in his condition. I know that Mr. Francis has worked during this period. I advised him not to do any work that would require any physical effort. The reason why he did not take that [64] advice was I suppose he had to support himself and his family. I figure that his work hasn't helped his physical and mental condition any.

(Testimony of Robert J. Hanley.)

Cross-examination
by Mr. Evans.

I did not testify that I thought he was totally disabled back in 1919. I haven't treated him since from 1926 until now. I imagine that he can follow the lighter parts of the occupation of cook and waiter, notwithstanding his disability, those parts where there would be no lifting or heavy work. He might do some lighter work, like frying, etc. I am not familiar with the amount of work he had at the Ferndale Cafe. He never runs a pulse less than 100. I have never found it so. His heart action is weak, and he has an accentuated second sound; he also has a lessened motility of the left lung, which causes that lung not to function in the same degree as the right lung. There is no grave disability of the right lung. That is almost normal at the present time.

His work in the Ferndale Cafe and in other places while I have been observing him has endangered his health or life this way: Here we have a man with a pulse of 100 to 120 average. He is not capable of exerting himself to the same degree as a man with a pulse of 72 or 60 or 70, which is practically normal—72. You see you have a man working there with a pulse running at 100, and there is an extra strain on that organ. You have an organ there that is supposed to be 72 in the normal and added labor increased that pulse beat

(Testimony of Robert J. Hanley.)

and the heart tires out quicker; it beats so many more beats a minute than it should, and that added up in a day's work causes it to beat about 148 x 200 beats an hour and tires the heart out, and that is what makes him tired and want to lie down. I don't know exactly how many times since I have had him under my care from 1926 to this time that he has been totally disabled in the sense that he has been confined to his home in bed—three or four times he has had to lay off and go to bed and rest. [65] That was usually for two or three days. His physical condition is better than it has been at any time since I first knew him in 1926. He is fatter and I can't find as many rattles in his lungs and his general appearance is better, except the heart is bad—the same findings—and his lung is moving as much as the other. I base my conclusions that the work he has done in the past twelve years has shortened his life and impaired his health because of the extra exertion on the heart. He has a bad heart to start with you see; he had a bad heart in 1926 and still has. It is practically the same now. You take a heart of that particular type and it is likely to quit at any time. Any exertion is likely to affect that heart. It is the strain on the heart. I am not able to advise a patient, just tell him what he is to do and not to do in order to protect his general well-being.

TESTIMONY OF JOHN L. TREACY

on behalf of the plaintiff:

My name is John L. Treacy and I am a physician and surgeon, located at Helena, Montana. I hold the position of Consulting Surgeon with the Veterans Bureau. I am a graduate of Rush Medical College, Chicago, Illinois.

I have been in the court room and have heard all the evidence. I have made an examination of Carl R. Francis and I made it at 12:00 o'clock or 12:30 today. From that examination I can give a partial diagnosis. The man has evidence of a very severe wound in the left chest, has scars, adherent and tender, in front, in the axilla under the arm, and in the back just below the shoulder blade. These are painful on depression. In addition to that, he has limitation of motion in his left arm—can't move it around as much as he can the other one, due to the fact that it pulls and drags back when he attempts normal motion. His left arm is somewhat atrophied; that is, somewhat smaller than the right. He has an impairment of grip. There is practically a difference of an inch in circumference between that [66] and his right arm. That is, the muscular power of the left arm is not normal by any manner of means. The man appears to be very nervous; that is, his pulse at 12:30, or approximately 12:30, today was 105 and his blood pressure at that time was about 95, which was quite low for a man of his age. It should be, normally, from 125 to 130. He is not a particularly well nourished individual, al-

(Testimony of John L. Treacy.)
though he is not at the present time emaciated; that is, particularly so. Otherwise, his physical condition is just about normal, with the exception of the important fact that an examination of his heart shows, beside the rapidity of the pulse, a very active, quickly-beating heart; also it shows lack of tone in the muscles. That is, it has no snap; doesn't pound as it ought. I did not notice any particular heart murmurs. He is extremely nervous, and I noticed particularly that in the examination of him he shows marked, what we call, dermographia; that is, if you scratch along the skin with your finger-nails, write your name, in a minute or two the skin becomes red, and will distinctly show such traces, which is an excellent manifestation of a disturbance of the central nervous system.

As to his kidneys I have no opportunity to make a laboratory examination of him, but I have listened to the testimony, and from that, in addition to such examinations as I have made, I would say he would carry albumin and casts in his urine on account of the condition that he is in, and testimony has been introduced here to that effect. He has lowered blood pressure and a severe chest injury, and chronic kidney involvement as well. I am drawing from the testimony which has been introduced here, because I did not make a laboratory examination. I think that about covers his condition as I find it. Taking into consideration the evidence I have heard here today, and also taking into consideration what

(Testimony of John L. Treacy.)

I have observed in my examination of Carl R. Francis, in my opinion [67] he is totally and permanently disabled within the definition of the Treasury Department.

Mr. EVANS.—Dr. Treacy has testified in these cases before and is familiar with the definitions, and it is not necessary to repeat it to him.

WITNESS.—I see no other reason for it, in my opinion, that total and permanent disability will date back to the time he was wounded in action. I don't think we have any evidence on record of very much improvement—certainly there will be no improvement of the chest condition, in the scars, nor in the arm, and to the best of my knowledge and belief, it is extremely rare for any improvement in such condition as the heart is in. Under the most favorable circumstances, the chronic nephritis is very likely to be permanent. The picture as it presents itself to me is simply this: This boy was struck in the chest and lung with a piece of shrapnel. There is no question but that something struck him. I am taking his word for the fact that it was shrapnel. This missile perforated his lung; I am positive of that, assuming that he is telling the truth always. I have no occasion to doubt he coughed and spit blood at the time, which he would not have done had it not penetrated the lung. He undoubtedly had a severe internal hemorrhage, which is manifested by the fact that he gradually grew weaker, and later on, he states that he was so

(Testimony of John L. Treacy.)

depleted—so much blood lost in France—that he was fearful for his life. His physicians were fearful of it, to such a point that they saw fit to introduce into his veins practically 700 cubic centimeters of blood. There is no reason to doubt——

Mr. EVANS.—At this point we object to witness continuing any further, in view of the evidence that we——

The COURT.—He is giving his opinion on the evidence he has heard in the case. He heard the entire evidence in the case.

Mr. EVANS.—Yes, I understand so, and I am perfectly willing that he testify as to his opinion, but I object to his repeating the evidence.

WITNESS.—I simply told you why I believe that. [68]

Mr. Evans. I think the answer of the witness is argumentative—a repetition of the evidence and not a recounting of his opinion.

The Court. Counsel can interrogate the witness, and in asking him his opinion on the various phases, without reviewing the entire testimony, there may be something very material he could bring out, not letting him cover the entire testimony. However, finish that sentence.

(Witness continuing). That this boy had at that time a very severe injury and hemorrhage, which we know would produce lasting results in itself. Subsequent to the time of this injury, the boy had for a period of months pus discharge from his lung,

(Testimony of John L. Treacy.)

from his chest, and undoubtedly had a lung abscess, and which is ample to cause a heart condition by absorption of the toxine, and it is also capable of causing the kidney condition. I have no reason to believe it is not due to his injury, and his condition is chronic—it is going to last—and if I were called upon in a private capacity to advise this man on any one of the three conditions which exist, it would be sufficient for me to advise him, if possible, to get complete rest. Chronic heart and kidney conditions require complete rest, and if he doesn't get rest, he is lost. The conditions which existed at the time of the wound were of such a nature that they would very much produce the conditions which he has now.

I don't think he has worked continuously. I have taken into consideration the fact that his work is not continuous, that he isn't able to work at times.

Q. Was there any impairment to his health—do you think this would be the natural tendency, to impair his health?

A. Certainly.

Mr. EVANS.—He has already testified to that.

The COURT.—He has gone far enough; he covered it [69] very thoroughly.

(Witness continuing). His work in the past twelve years impaired his health or has been a serious menace to his health in this way: In the first place, to make it very brief, I agree with Dr. Hanley—I believe that a heart that is going once

(Testimony of John L. Treacy.)
and a half as fast as it should is working too hard, and he ought to be able to rest; in the second place, I don't believe that a man with a chronic kidney condition should be exposed to heat, steam, vapor, cold, heat and things around the kitchen. He would be better off if he were to rest.

Cross-examination
by Mr. Evans.

Q. Now, doctor, you have heard all of the evidence, and I ask you to state definitely, if you can, what impairment of mind or body he suffers at the present time which is the result or directly attributable to his having worked during the past ten years.

A. I think the best way I can answer that is by referring to my examination and history of the case. I find that during the past six months or so, he has not been working, but has been loafing around the Country Club, and has not been actually engaged in work, and that as the result, he is better. I maintain, therefore, that if he had not worked during the past ten years, he would be in much better condition than now. He has harmed himself and has probably worked on his nerve. I don't think his heart and kidneys, and especially his nervous system, would have been in their present condition had he been able in 1919, when he got out of the Army—had he been a man of wealth and

(Testimony of John L. Treacy.)

could have retired and rested. I couldn't say how much it increased the bad condition.

Q. Assuming that he was totally disabled in the first place, how could he get any more disabled by having worked in the past twelve years?

A. I talked of the total disability as regards the [70] Treasury definition. Of course if he had been totally disabled, he would have been unable to work at all, would not have been able to get out. As he tells on the witness stand here, he has not been able to continuously carry on a gainful occupation.

Q. The evidence is that he has, doctor, but you are endeavoring to explain it that way because of this definition of "continuous." What is your understanding of "continuously following a gainful occupation"?

A. My understanding of it—exclusive of any legal definition—is that a man, in order to do so should be able to go out in competition with the world and work day after day and week after week and year after year, in his given vocation, until his life ends.

Q. How long must that continue?

A. Well, the normal span of life—threescore years and ten.

Q. Then do you believe that if a man loses one week in a year he is not continuously following a gainful occupation?

A. No, I didn't say that.

(Testimony of John L. Treacy.)

Q. Well, do you believe that if he loses a month in a year, that he is not continuously following a gainful occupation?

A. If he lost a month every year on account of sickness, I think he would be pretty close to that point.

Q. But do you believe that a man who follows it for two years and eight months, in accordance with the testimony, and draws pay for that time, is not following continuously a substantially gainful occupation?

A. I believe he was during that period.

Q. You believe that during that period he was continuously following a gainful occupation?

A. Yes.

The COURT.—Suppose he is able to work for two years and eight months and the evidence should [71] show that, while he has been employed, we will say continually, he has not been able to work continuously. Suppose occasionally and at frequent periods he has been ill from the cause you describe, and as stated, has not been up for three or four days at a time, and frequently during that entire period, other good-natured and friendly men and women have done his work for him; that he has had frequent fainting spells, as testified, then what would you say as to this?

A. That is a different question from Mr. Evans'. I would say that he was not capable of following

(Testimony of John L. Treacy.)

a gainful occupation as described by the law, under the circumstances you give here.

The COURT.—Well, we will have to put the evidence in there. We are putting a hypothetical question that the jury may have the benefit of expert tetimony, and the jury may have to determine that. Proceed.

Mr. EVANS.—That is all.

Mr. SMITH.—The plaintiff rests at this time.

Mr. EVANS.—If it please the Court, I have a motion I want to argue as follows:

The defendant herein moves for a directed verdict, reserving for itself the right to have this cause submitted to the jury, but at this time moves the Court for a directed verdict, for the reason and on the ground that there is no substantial evidence in the record that the plaintiff became totally and permanently disabled on the date mentioned in the petition, or at any other time, and for the further reason that, assuming that all the evidence is true as given herein, such evidence is not the sufficient basis to support a finding of permanent [72] and total disability.

The COURT.—The motion will be denied.

TESTIMONY OF WILLIAM H. FORTIN

on behalf of the defendant:

My name is William H. Fortin and I am located at Fort Harrison, Montana. I am a physician and I have been a practicing physician since 1908. My present employment is Outpatient Medical Officer. I don't make physical examinations of veterans of the World War at this time; I did previously,—not since I have had charge of the desk.

I know the plaintiff, Carl Francis, and I have made an examination of him at the Veterans Bureau's office at Helena, Montana, March 3, 1926. I did not make an examination of him before that to my knowledge. As to his physical condition and all of his disabilities—at that time I made a special examination of his chest, particularly with reference to his lungs, and I found or diagnosed the condition which I described as chronic fibrous pleurisy and fibrosis of the left upper lobe. In considering his disability from following the ordinary occupations of life I think we would have to consider the entire condition—the traumatism or injury as well as the result. The fibrosis in the lung would have a tendency to perhaps make him a little short of breath. The thickened pleura would tend to restrict the motion over that portion of the lung, further increasing the shortness of breath. Then, too, the contraction of the scar over the wound would perhaps increase the restriction over that portion of the lung so that the breath would not be as easy, especially under exertion, as if he did

(Testimony of William H. Fortin.)
not have that condition. There was no heart condition found in 1926. The heart beat was regular, no murmurs; blood pressure 112-78. That blood pressure in my opinion indicates that his condition is normal. In 1926, when I examined him I found his heart normal as any other man's heart. With reference to the testimony to the effect that [73] in 1926 and at other times, he was suffering from a condition of the kidneys called nephritis, there is no urinalysis of record; therefore, I do not know whether a urinalysis was made or not. However, there was no complaint on the part of the plaintiff at that time in reference thereto. In making these examinations it is usual to ask for all of the complaints of the patient or man being examined. When a veteran applies or presents himself for examination, the first thing we do is to ask him concerning his complaint. I have the complaint here in writing as to what was stated to the doctors.

Q. Will you please read the same.

Mr. Smith. Was this entire statement made to you and signed by Mr. Francis?

Witness. Yes.

Mr. Smith. No objection, Your Honor.

(Witness continuing). I asked him if his lungs gave him any trouble and his reply was: "Just in my chest; when I get cold the left one draws; the two outer fingers get numb." In 1926 he made no complaint of either kidney or heart trouble. No, I don't have all of the examinations that were made,

(Testimony of William H. Fortin.)
consisting of all examinations made by doctors from the time he left the Army until 1926, but at that time I had the entire file before me.

The regular routine followed by me as to bringing forward any diagnoses of diseases previously suffered at the time of my examination and examining particularly for the disease which the history shows he may have suffered from, is, first, to get the man's complaint. After that, I will take his case file and refer to the Adjutant's record, covering his medical record in the service. After examining the medical record in the A. G. O., the record from the Adjutant General's office covering his service in the Army, I then begin at the front of the file, unless it is a short one, with which I am very thoroughly familiar—in which case I don't have to do that—[74] and I go through the file and find the diagnoses made by other examiners in the past. After getting all the data in the file and the A. G. O., I proceed then to examine the man myself and give attention to the information I have gathered. As to the nature of the kidney condition and the heart condition as to whether they were temporary ailments or a permanent chronic condition, all I can say is they were not permanent at the time I examined him, and if some other doctor found they were subsequently, I couldn't dispute that. It is possible that he would have a temporary condition such as they testified to which did not continue to the time I examined him. There

(Testimony of William H. Fortin.)

was some testimony yesterday by Dr. Treacy that he had a pulse of 106 at 12:30 o'clock yesterday and I can account for that rapid pulse by other means than as a permanent disability of the heart. The pulse may vary from one hour to the next all during the day, depending upon what the man is doing. Very likely a man who has been on the witness stand for two hours just prior to having his pulse taken might readily have a pulse of 106 within 15 minutes to half an hour after having been on the witness stand. The cause of such a pulse is probably the man isn't accustomed to testifying and is under a nervous strain and is somewhat uneasy—all of that would tend to increase the pulse rate.

I heard all of the testimony yesterday.

I have had x-rays made of this veteran and there is nothing in any of the x-rays or other examinations to indicate that the missile entered the lung. When a missile penetrates through the lung tissue itself, that is discernible in the x-ray film of the lung in that the portion of the lung tissue that was destroyed will be replaced by fibrous tissue, which is familiarly known as scar tissue—a dense fibrous tissue, and that tissue being denser than the lung tissue itself, will show a streak across that portion of the lung.

Q. Did you see any such streak in the x-ray picture?

The Court. Where is this x-ray? [75]

Witness. Dr. Bridenbaugh will have it.

(Testimony of William H. Fortin.)

The Court. You should have it here right now, to be fair about this; it is not sufficient to say that some other doctor will produce the x-ray and you testify about it—give testimony about something that is not present.

Mr. Evans. I will recall this witness later.

(Witness continuing). In my examination of this man about the only disability or condition he had which would handicap him from following his occupation as cook or waiter would be the injury, or the scar tissue which formed at the side of the injury, and whatever injury was done to the nerves in that region. So far as the lung itself is concerned, it would not handicap him in any way. I do not believe that the disabilities from which he suffered in 1926 when I examined him prevented him from following the occupation of cook or waiter, and that is verified by his statement that his present occupation was that of cook, which he was following at the time.

Cross-examination
by Mr. Smith.

The examination report from which I testified is my own report and I haven't referred to anything except his statement to me and my examination findings. I made no other examination of him. Dr. Smith, Dr. Berg, also examined him and I was not present; and they were not present when I examined him. The statements I refer to were

(Testimony of William H. Fortin.)

those made to me and not those made to Doctors Berg and Smith. I can't say what statement, if any, he may have made to the other doctors with reference to the other ailments. I did find in my portion of the examination that he had a lung condition there due to this scar. I also examined the heart at the same time as the lung, that fell to my duties then. That is true that a person may be troubled with kidney trouble and know nothing about it, and it frequently happens and it is true that usually the first information a person has is after the doctor has made an [76] examination. It would not be unusual if Mr. Francis did not make any complaint of kidney trouble. It is not correct that the only examination doctors give him is directed to the complaints he makes. In answer to Mr. Evans' question my reply was that the first thing we do is to take the claimant's statement of his complaint; after that I refer to the case files, and the first thing I look for in that file is the A. G. O. record, to see what medical record he carries from the time he was in the service. After that has been reviewed, I follow the examinations through the file up to the present time, to see the diagnoses that had been made in this case at previous examinations. Then I make my examination to pay particular attention to his complaint, the A. G. O. record, which is the record of medical treatments rendered during military service, or

(Testimony of William H. Fortin.)

previous examinations which show a condition existing.

I have examined Mr. Francis just once to my knowledge. I have no record of any other examination.

I have been in Helena a little over nine years.

If I find anything wrong other than the complaints that are made, I do not tell the patient what I find wrong unless he asks for it, or if it is some particular thing he should be advised on, more particularly a heart condition, tuberculosis, or something of that sort, where I would have occasion to warn him to avoid certain exertions or conditions. I always feel that if there is anything about a veteran's condition he should know, it is more important for him to know it than to have it in the case file. It is possible that conditions develop about which the veteran has never known on these examinations.

The average normal pulse rate is usually recognized to be about 78 in an adult person normally, but there are a great many people who have a pulse slower than that and are normal, and a great many are way above and are normal. The normal range is 70 to 80 we will say. I wouldn't say that when it gets up to 80 it is really getting beyond normal, [77] unless I had a patient under observation and found that 80 or 85, whatever it might be, was not normal for that individual. Taking the pulse for the first time, you couldn't arrive at any

(Testimony of William H. Fortin.)

positive conclusion—you wouldn't know whether that was his ordinary pulse rate or whether it was a temporary condition as set up by some temporary environment, or whether it was the result of some chronic disease that might be present. In order that we have a true picture of Mr. Francis' pulse rate, it will be necessary for me to take that rate on different days and under different environments, and not only that, but it would also be necessary to examine and see if there was anything wrong to produce it. Before I would want to say anything definite as to his pulse rate, I would want an opportunity to examine under different conditions—want to examine him and know the conditions under which the pulse rate existed, at different times, unless I found him suffering from some disease which would account for that condition. I examined Mr. Francis' pulse rate just the once. The pulse rate is not recorded at that time. Heart rate regular, no murmurs. Blood pressure 112-78. That is all, it doesn't show a pulse rate. If there had been anything abnormal about it, it would have been recorded. I say the blood pressure was 112-78 and that is not abnormally low blood pressure. As to the normal pressure, I have not his age here; don't know how old he was at that time. I would say, oh, 120, or even more, 112, 115 to 130-35. 120-80 would be recognized about normal, and a variation of 10 millimeters either way is within the normal limits. 120-80 is the doctors' standard for a person about

(Testimony of William H. Fortin.)

20-21 years of age. Your blood pressure goes up as you grow older. If it is 120-80 at about 20-21, the normal at about 32 may be the same, or it may be up to 125 or 130. The second figure at 32 may be the same; that doesn't go up as rapidly as the systolic pressure. It may be that the normal figure that we work from for a man of 35 is about 125-80; it isn't always. [78] It may be 120-82. In answer to Mr. Evans' question I stated I thought it very likely that the fact that the man has been on the witness stand for more than two hours previously had some significance with reference to the pulse rate of 106 that Dr. Treacy found. This testimony had no reference to the statements of Dr. Arnold and Dr. Hanley. It is very possible that in six years time there could be quite a difference in this man's pulse rate. My testimony is in reference to the examination made March 23, 1926, and I do not attempt to refer to the man's condition before or after that.

TESTIMONY OF JAMES I. WERNHAM

for the defendant:

My name is James I. Wernham and I am a practicing physician here in town. I know Carl R. Francis. I examined him, I think—I don't remember the date—several months ago—perhaps five or six months ago.

(Testimony of James I. Wernham.)

Yes, that is my handwriting on that statement. As it has been recorded here, his complaint was pain in the arm and forearm, extending down the arm to the fingers, and complaint of numbness in the arm and chest, and that the arm and shoulder were not as strong as they formerly were, and pains in the chest, in the region of the heart, and he complained also of irregularity of the heart and the heart pounding. He also said that he was unable to do the amount of work that was required of him in his occupation of cook. In fact, he was unable to do any heavy lifting, as, for instance, lifting the flour and packages necessary in that work, and on examining him, I found that he had a scar, which was, as he said, from a gunshot wound in the upper left shoulder; that is, immediately above the base of the heart, and also an operative scar, where he had been operated upon, posteriorly, where he said a foreign body had been removed. The left arm seems to be smaller than the normal right, seems atrophied. He was unable [79] to say whether it was due to lack of use, being his left arm, or from a nerve injury—some atrophy, somewhat like paralysis, so measuring the arm, it was found to be one inch less in circumference than the normal right arm, and he was unable to raise the arm to the level of the head or back parallel of the line of the body. As to his general appearance at that time, he had a sallow complexion. He was erect in stature; his gait was normal, and his temperature was

(Testimony of James I. Wernham.)
normal. His pulse was 88 sitting, 112 standing. The valvular tones of the heart were normal. The blood pressure was 120 systolic and 78 diastolic. The outer edge of the heart seems extended further to the left than normal, which would be either due to enlargement of the heart itself or due to scar tissue drawing the heart over. The urine examination was negative. At that examination I think there was some weakness of the heart. The fact that the pulse was 88 lying down and 112 on getting up showed there must have been some weakness of the muscle. This is faster pulse rate than normal. In my opinion there was nothing about that heart condition that would prevent him from doing his work as a cook or waiter, not in doing the immediate work itself. I would say that the lack of strength and other disabilities in that arm would probably handicap him some in doing the duties, or a part of the duties, of a cook and waiter. He has some disability—things that he would do with more difficulty than he would otherwise experience. As to lifting heavy objects and such as he has testified to, I think the strength in that arm is somewhat impaired. He has not muscle power—the arm is smaller. There is no weakness in the other arm. I think he has full function of that right arm. I made an examination of his urine and the urine was normal. It is my opinion that in January, 1931, when I examined him, he had no kidney disease at that time. [80]

(Testimony of James I. Wernham.)

Cross-examination
by Mr. Smith.

The date I made this examination is there; I don't remember it. The date is January 27, 1931, longer than I said, made about sixteen months ago.

Mr. EVANS.—Did you ever examine him before that, doctor, as you recall?

WITNESS.—I don't recall that I ever did. He might have been in the office with some of his family, but I don't remember that I ever examined him.

Witness (continuing). In making this examination I can't say that I was doing this for the Veterans Bureau. I am the Government doctor here in town, I represent the Veterans Bureau. No doctor assisted me in this examination. I think this was a personal examination. You see I do practice, besides the Veterans Bureau work, and I think Mr. Francis came to me as an individual, rather than as a patient of the Veterans Bureau at that time. In my examination of the heart I found that it was not normal and I also found what you might call a myocardiac insufficiency. It should be treated by not over-exertion. I think the only treatment we doctors can prescribe for such condition is rest. From my examination I recognized that he did have a disability. There was nothing in my examination that made me doubt his statements that he was not able to do all of his

(Testimony of James I. Wernham.)
work as a cook and waiter. I said his urine showed normal. There may be times when albumin will not show in the urine and at other times will. All I can say is that his kidneys were normal at that time. I couldn't say that at other times they might be different—might be.

The COURT.—Anything further?

Mr. SMITH.—No, that is all, Your Honor. [81]

TESTIMONY OF J. H. BRIDENBAUGH

on behalf of the defendant:

My name is J. H. Bridenbaugh and I am a physician, practicing here in Billings.

Mr. SMITH.—We will admit his qualifications.

(Witness continuing). My specialty is x-ray. I have taken x-ray pictures of Carl R. Francis and I have them with me. The pictures were dated July 2, 1923. I examined him, his chest, two or three days ago, at the request of another physician, and the films were delivered to the physician. The attorneys for the plaintiff have an x-ray picture in their possession that I made. An examination was made at the request of another physician and was sent—x-ray and report—to another physician, Dr. R. J. Hanley. I was not in court yesterday, but he was the same Dr. Hanley who testified here yesterday.

(Testimony of J. H. Bridenbaugh.)

The x-ray examination that I made for the Government was made of the chest to show the condition of the heart and lungs. I find no evidence of disease of either heart or lungs or the bones of the chest. Referring to the testimony to the effect that Carl R. Francis in 1918 suffered a wound from a piece of shrapnel about the size of the thumb, and that that, in all probability, entered above the heart and penetrated through the chest and was taken out under the shoulder blade at the back, such a wound would not necessarily leave evidence in the lung tissue that would show up in an x-ray. If such a wound had occurred, going through the chest, in the lung, and had penetrated through the lung, if there was a real disability of the lung itself from that injury, such disability might be evidenced in the x-ray. Referring to the x-ray picture I can't find any evidences of scar tissue in that lung that might come from a penetrating gunshot wound. I have never made any other than an x-ray examination of this patient.

Mr. EVANS.—You may cross-examine.

Mr. SMITH.—No cross-examination. That is all. [82]

Mr. EVANS.—Before the doctor leaves, I would like to have the plaintiff produce the x-ray taken by Dr. Bridenbaugh a day or two ago. If you are

going to produce it, we would like to have it before the doctor leaves is all.

Mr. SMITH.—We have no objection to the same being brought in, doctor—no objections on our part.

Mr. EVANS.—I think it would be informative at least if you will do so, doctor, and we will return it at your convenience.

TESTIMONY OF DR. WILLIAM R. MORRISON

on behalf of the defendant:

My name is William R. Morrison and I am a practicing physician here in Billings.

Mr. SMITH.—We will admit the doctor's qualifications.

(Witness continuing). I know Carl Francis and I have examined him. My examination was a special one. My specialty is eye, ear, nose and throat. I first examined him some years ago. It was in the early stages of the Veterans Bureau activity.

Referring to the two reports which you handed me, one dated in July, 1922 and the other in December, 1922, there was no disability at that time, from that angle. As far as his eyes, ears, nose and throat were concerned he suffered no disability whatsoever in 1922. I know nothing as to the other parts of his anatomy, as to his disability. I made no examinatiton as to that.

Mr. EVANS.—That is all—you may cross-examine.

Mr. SMITH.—No cross-examination.

TESTIMONY OF MARCUS H. WATTERS

on behalf of the defendant:

My name is Marcus H. Watters. I am a physician.

Mr. SMITH.—We will admit the doctor's qualifications.

(Witness continuing). My appointment is physician, Veterans Administration Hospital, Fort Harrison, Montana and I have been there seven years the 3rd day of last March. [83]

I have examined Carl R. Francis on June 28, 1927, as I remember the date. Those memoranda which you hand me are the clinical and the other is the case personal file of the patient, while he was in the hospital at Fort Harrison.

The examinations at Fort Harrison are made, first, beginning with what is known as the receiving or reception ward——

The COURT.—Ask him a few questions to shorten it up.

(Witness continuing). I am a member of a board of three who finally review all of the examination reports, and in case of question I personally examine the man, and I did personally examine Carl R. Francis in connection with these

(Testimony of Marcus H. Watters.)

other doctors, on the date stated. At the time of my examination in 1927 I found Carl R. Francis suffering from sinusitis; that is inflammation of one of the air chambers; I think it was either the right or the left—it doesn't make any material difference. He also had atrophy of the shoulder muscles; that is a shrinkage. In other words, the left arm was smaller than the right, which was due, in all probability, to the high explosive injury he received during service. There was also a diagnosis made by a specialist in nervous and mental diseases, due to his having neuritis (which means inflammation) of the left ulnar and median nerves. He also had shown, in both physical examination and x-ray, a fibrosis, which means scar tissue, from the healing of some wound in the upper lung, which is in the upper lobes, and diagnosis of a pleurisy, which is a thickening of the pleural sack covering the lungs, in the left upper lobe. He also had some ordinary conditions which do not amount to anything in particular, except—well, they really don't amount to anything—some dental trouble—his teeth, that is all. I should judge that I had him under observation at that time, probably—that is pretty hard to answer—probably about thirty minutes or so, personal observation. He was in the hospital from May 27, 1927, to July 10, 1927. He came to the hospital at that time for—the complaint being swelling in [84] his face, which he thought, or was told, might be due to the condition which I previ-

(Testimony of Marcus H. Watters.)

ously mentioned, sinusitis, or inflammation of one of the pockets in the cheek bone. The other complaint was of rheumatism in the right hip and knee, which he said prevented him from working from time to time. I have x-ray facilities and laboratory facilities for the study of any and all diseases at my command there at the hospital. The x-ray of the lungs, that is, the chest x-ray did not show any disability or any disease of the heart in 1927. A physical examination did not reveal any disease of the heart at that time, that is 1927.

I have the temperature and pulse charts with me. The pulse rate on admission was 90. The second day after admission, it was recorded as 100. In the afternoon of the same day it was recorded as 80, and with the exception of a few slight declines in the pulse rate, for the next week it did not reach higher than 90, and the average pulse rate was 85. His blood pressure at that time was 120-84 I think, if I recollect correctly. Yes, 120-84. It would be considered practically a normal blood pressure for a man of his age I would say. This examination was made in 1927 and at that time there was no indication of disease of the heart that would prevent his following that vocation, that is in 1927. The neuritis or inflammation of the left ulnar and median nerves, as previously described would prevent him from following the occupation of a cook or waiter; also the atrophy of the

(Testimony of Marcus H. Watters.)

shoulder muscles and the consequent atrophy of the muscles of the left arm.

Q. Now, did you understand my question, Doctor? I did not state the question "handicap" him from following that, but "prevent" him from following.

(Witness continuing): I did not understand your question, and it is my opinion that this disability would not prevent him from following that occupation, but I agree, however, that it would handicap him. How seriously, it seems to me, would have [85] to be answered by qualifying same—depending upon whether the man follows the occupation of cook or baker in a position of first cook, second cook, or what not. Assuming that he is qualified as a cook, and that he has help in lifting the heavier objects and is favored to some extent by fellow employees and others, I believe that with that assistance, in 1927 he could have followed the occupation of cook or waiter. At the present date, I can't state.

Cross-examination
by Mr. Smith.

I believe with the assistance of other persons in performing parts of his duties he could follow the occupation of cook. As to the effect the continuous and steady hard work would have upon him at that time in his work as a cook since 1927, it is quite possible and quite probable that, under strain—ex-

(Testimony of Marcus H. Watters.)

treme exertion—his heart conditions we have talked about so much might have developed, and it is a very probable condition. Nobody can tell what might be the effect. The fact that there were pus formations at the time of his wound that continued for several months, it is possible that those pus formations were capable of producing a heart condition that might not be apparent for years and show up later in life. A pus formation of that kind does bring about a heart condition that eventually develops into heart trouble.

Redirect Examination
by Mr. Evans.

Yes, sir, an examination was made of the urine. The urine was negative as to the presence or absence of nephritis or kidney disease. At the time in 1927, my conclusion was that he showed no evidence of kidney disease. [86]

Recross Examination
by Mr. Smith.

There were two urinalyses taken at that time. The fact that albumin did not appear at that time was not positive proof that there was not that condition, and especially after rest the albumin is apt to clear up and leave the urine.

(Testimony of Marcus H. Watters.)

Redirect Examination
by Mr. Evans.

If this man had suffered from the condition of nephritis, possibly for a period of seven or eight years prior to this time, it might and it might not show in his urine. The probabilities are, if he had true nephritis or Bright's disease at that time, it would have shown then. I do not believe that nephritis has existed ever since his discharge from the army and shown by the Army Records. I do not recall the evidence as stated in the Army Records of 1919 in relation to nephritis and of course it is possible that it existed, but I don't recall the date of the final healing of the wound or abscess, so I could not make a statement as to that.

Q. But in any event, you are quite sure that there was no particular disability from the kidney condition in 1927?

Mr. SMITH.—Object to that. It is repetition.

The COURT.—Yes, he can't testify unless there is some foundation upon which to base it.

Mr. SMITH.—That is all.

TESTIMONY OF J. H. BRIDENBAUGH,

recalled on behalf of the defendant:

Q. Doctor, I hand you the three x-rays which you had in your possession a moment ago, and will

(Testimony of J. H. Bridenbaugh.)

you select from them the one that you stated was taken day before yesterday?

(Witness selects such x-ray.)

Mr. EVANS.—We will offer this as Exhibit G. We offer Exhibit G in evidence. [87]

Mr. SMITH.—No objection.

WITNESS.—I had experience as a surgeon during the World War. I did x-ray work at that time. The difference between shrapnel and machine gun bullets, or rifle bullets, as to their effect on the human body, and especially on the chest is that a shrapnel wound ordinarily causes a more serious wound because it is an irregular object and traumatises the tissue. Assuming that it was a piece of shrapnel the size of the end of my thumb, as testified to, that struck him above the heart in the left chest, and was extracted from the back under the shoulder blade, as to the probability or possibility of that having been a penetrating wound or otherwise, the only statement I could make would be from the x-ray study. The x-ray shows no trace of a penetrating wound having been received. Assuming that it did penetrate the lung, there is no evidence in the x-ray study of a disability of the lung suffered at the present time.

Cross-examination
by Mr. Smith.

An x-ray would not necessarily show a myocardiac insufficiency and it would not always show such insufficiency.

TESTIMONY OF LOUIS W. ALLARD

on behalf of the defendant:

My name is Louis W. Allard and am a practicing physician here in Billings.

Mr. SMITH.—We admit the doctor's qualifications.

WITNESS (continuing).—I would not remember Carl Francis except from my notes or report. I have copies of the examination or the notes that I made in my possession. I examined him on January 15, 1924. Shall I read my report as it is?

The COURT.—Any objection?

Mr. EVANS.—Only the material parts, doctor.

Mr. SMITH.—Are these your notes that you made at the time of the examination?

WITNESS.—Yes, this is the report I made to the [88] Board at the time of my examination.

Mr. SMITH.—That is from your notes?

WITNESS.—Yes.

Mr. SMITH.—You haven't your notes with you?

WITNESS.—No, I haven't.

Mr. SMITH.—Did you make the examination yourself or is your report based on an examination by some other doctor?

WITNESS.—I made the examination myself.

Mr. SMITH.—I don't think there is any objection.

The COURT.—No, proceed, Doctor.

WITNESS (continuing).—This report is made in connection with the Board and I have no record of the complaints made at that time. It is cus-

(Testimony of Louis W. Allard.)
tomary for a man to make a complaint to the Board at the time he is examined only as we question him as to his physical disability, which we do of course to determine what examination we should make. By referring to these notes here I could state definitely what complaint was made at that time. He complained of soreness in the left chest and arm when doing anything involving an extra use of the left side. There are no other complaints recorded here. Referring to my notes, the subject is a well-muscled, symmetrically developed individual, with straight limbs, normal spine, square, symmetrical shoulders and normal joints and feet. The muscles are normal in tone and range of action, except slight atrophy of the muscles of the left arm and forearm, and slight limitation in abduction of the left arm at the shoulder. Four well-healed scars, the result of a wound received in action, are noted on the left thorax, as follows:

1st, an irregular, key-shaped, scar, 4 inches in length, with a 4-inch cross scar, averaging about 1¼ inch in width, situated at a point bisecting a line drawn from the nipple to the middle of the left clavicle. This scar is adherent to the pectoral muscle and covers a bony irregularity [89] in the 2nd, 3rd and 4th ribs.

2nd, a scar ½ inch wide, extending downward and forward for 3½ inches from the lower angle of the scapula. This scar is adherent to the subcuticular tissue.

(Testimony of Louis W. Allard.)

3rd, a triangular scar with the apex at the posterior axillary fold, extending backward 2 inches to a 1-inch base.

4th, an irregular scar, 3 inches in length, averaging 1¼ inches in width, situated in the axilla, and adherent to the subcuticular tissue.

All scars are well healed. The contracted biceps of the left arm measure 1 inch less than the right arm. The forearm has most prominent circumference; also measures 1 inch less on the left side. There is diminished sensation in the region of the small, internal, cutaneous nerve of the left arm. There is a large varicocele and a very pendulous bag. Diagnosis: Well-healed gunshot wound left thorax, left varicocele. Slight atrophy in the left arm and forearm. The only diagnosis made on the report by the Board was gunshot wound, left chest, healed. The date of my personal report was January 15, 1924. I don't know what Carl Francis was doing at that time.

Had the shrapnel penetrated the chest wall, I think I would have had something about that in my notes, and I haven't anything of that kind in my notes. I do have some remarks in my notes that there was a roughening under one of those scars, probably on top. That would indicate that the periosteum on the surface of the ribs was probably torn at the time of the injury. In that gunshot wound scar and other scars, in my professional opinion I think I do not find anything to

(Testimony of Louis W. Allard.)
indicate or rather which would prevent Carl in 1924 from following the occupation of a cook or waiter.

Cross-examination
by Mr. Smith.

If this piece of shrapnel was removed from the chest at the posterior wall, and it appeared from the evidence at the time the man was injured there was very little outside [90] bleeding, but that the man spit blood, that would not necessarily indicate to me that the shrapnel penetrated the chest. A fracture or a deep contusion would cause bleeding from the lungs. It wouldn't have to penetrate necessarily.

Q. How would the shrapnel get around to the back?

A. There was evidence of scars on the axillary area, under the arm, evidence of scars in front, and evidence of scars I believe in the back, and a suggestion to me that probably he received this injury from the side.

Q. You mean coming in from the arm?

A. Yes.

Q. If the evidence would show that the scar underneath his arm—axillary—whatever you call it —was made for the purpose of probing, then of course that scar would not be made by the shrapnel, would it?

A. Not if shown that it was made in some other manner.

(Testimony of Louis W. Allard.)

Q. With that condition in mind, how do you figure that this piece of shrapnel got around from the front (it being shown from the evidence that he was struck in the front) to the back—to one of the scars on the back?

A. Does the evidence show more than one piece of shrapnel?

Q. Just one piece appears in the evidence.

A. Usually a missile of that kind takes the straightest line through. In that case, it would have to go through the chest wall, but it is possible it can follow the tissue plane. If it should appear that later this man developed empyema in this gunshot wound, and this condition continued for a period of about six or seven months, until the scars healed over, it would suggest a penetrating wound, but not necessarily indicate, but suggest it, and the fact that he spit blood immediately after the injury would also suggest it. [91]

Redirect Examination
by Mr. Evans.

(Doctor examines x-ray). There is no evidence indicated here in Exhibit G., which is an x-ray taken day before yesterday, of a penetrating wound of the lung tissue, none that I can think of. The left lung is clearer in that picture, in my opinion than the right. Assuming that this is an x-ray picture of Carl Francis' lungs, the evidence indicates that the left lung is better than the right lung as to condition.

TESTIMONY OF A. M. LOOMIS

on behalf of the defendant:

My name is A. M. Loomis and my business occupation is running a lunch room. My cafe is the Ferndale Cafe and it is located at 25th St. and Montana Avenue, Billings.

I know Carl Francis, the plaintiff in this suit, and I employed Mr. Francis. The first time as I remember, it was the last day of 1923. I think he continued to work for me something like two years or two and a half, the best I can remember. He did my best job in the kitchen, chef cook and pastry cook and I paid him $32.50 a week. I don't think I ever had any complaint or fault to find with his work as cook while he was in the Ferndale Cafe—no more than I had with any other cook—as little as I ever had with any cook. He performed his service satisfactorily for me. He left my employ because he wanted to take a vacation for a couple of weeks, to go into the mountains, and I sent for my brother, and then I got him to stay with me that winter, as long as he would stay. That must have been in 1927, as I remember,—in the summer of 1927, and my brother Elmer stayed through, as I remember, the rest of the year. He was off two weeks and then my brother worked six or seven months, and then Francis returned and worked for me. I got him back. I asked him to come and work for me. He continued to work for me at that time up until in 1931, most of 1931, most of the time. He [92] had some little time off, I guess.

(Testimony of A. M. Loomis.)

The circumstances of his leaving me in 1931 were: I came into the kitchen and he said: "I guess I will leave," and I said, "Oh, all right; it's all right with me." I didn't discharge him. Some years he took a little more time off from the job than others during the years he was employed by me, possibly sometimes a week or so, and three or four days once in a while, when he wanted to go somewhere—be off for some reason. I think he got sick on the job. I don't think it was so very often, but then I don't just remember. I don't think he was ever out for a period of a week or two weeks at a time on account of sickness—maybe as much as a week, once in a while. I don't recall it if it was over a week. That is kind of hard to say for sure how much time he lost in any one year by reason of being off. I don't think over a couple of weeks, for all purposes, in about four years.

Cross-examination
by Mr. Smith.

I think Mr. Francis came to work for me the last day of the year 1923, and he worked for me from that time for two or two and one-half years. Mr. Francis wanted to go up in the mountains and my brother Elmer and I did the work, and I really think he did work two or three days while my brother Elmer was here. When he came back to go to work after he had been in the mountains, there was no work for him there while my brother

(Testimony of A. M. Loomis.)

stayed. When my brother left, I think he worked about seven or eight months, something like that, the following summer. I think it was pretty early in the spring—anyhow after Christmas. Then he worked for me up to the spring of 1931, at which time he just quit. I think he did not give me any reason for quitting. He said he believed he would quit. I said, "All right." While he was on the job, the kitchen work was performed satisfactorily. My duties were mostly in the front of the building.

[93]

TESTIMONY OF MRS. A. M. LOOMIS

for the defendant:

My name is Mrs. A. M. Loomis and I am the wife of Mr. Loomis who just testified. I work in the Ferndale Cafe. I know Carl Francis. I was there in the Ferndale Cafe when Mr. Francis was employed there in 1924, and on up until 1931.

My observation as to the employment of Mr. Francis as a cook, as to his ability to handle the job and his being satisfactory, well, most always it was satisfactory. I did not hear Mr. Loomis complaining of his work or of his ability to do the duties required of him as a cook very often. I don't know that I ever did have to help him in his work in any way. Sometimes I have gotten the orders if he were busy—something that way. When the shift was busy, they quite often stepped in and

(Testimony of Mrs. A. M. Loomis.)
helped him, if there was something on the stove that needed to be taken care of. I don't know but what he always did his work. He complained sometimes of having a headache and being tired as a rule. I never saw him faint on the job, and I was there practically every day.

Cross-examination
by Mr. Smith.

I know that in lifting stock pots from the stove, they used to help him. We have always kept two dishwashers and they have always assisted in doing the heavy work. We don't expect our cook to do that work. I never knew definitely that he ever had a spell at the range that way. He complained of not feeling well and all, but I didn't know he fainted. I am, practically all the time we are open, between dining room and kitchen. He always spoke of being tired and not feeling well. Mr. Francis was a dependable man and I could depend upon his being there, and as long as he was on the job and the work was gotten out, that was all I was concerned about. If it hadn't been for the fact that the work was gotten out at all times, I would not have been able to keep him there. If the other employees in the kitchen helped [94] him to do portions of his work, there was no objection on my part to his doing that. The thing the both of us were concerned about was to have the work go along. I know he forgot orders sometimes.

TESTIMONY OF CHARLES E. RICHSTEIN

on behalf of the defendant:

My name is Charles E. Richstein and I am a resident of Billings. I am foreman of the Purity Bread Company, and I was with the Purity Bread Company in 1920.

I knew Carl Francis in 1920. He was employed in the Pastry Department where they make cakes, and I was employed in the Bread Department, upstairs. I recall him quite definitely. He and I didn't work together. I saw him right along when he was there. I think he did the work all right. I didn't hear any complaint about his being sick at that time—seemed to be satisfactory while there. I didn't see anything wrong with him physically at that time.

Cross-examination
by Mr. Smith.

I said that I worked upstairs in the bread shop and Mr. Francis worked downstairs in the pastry department. The bread part is the heavy work. My duties kept me fairly busy in the bread department. I got down to the pastry department quite often. We had a steam boiler down there, and we had to run down quite often. At that time I think there were four employees in the pastry department, if I am not mistaken. I didn't pay any particular attention to Mr. Francis. I didn't understand how he got to be employed there; I didn't understand that the Government put him there. I

(Testimony of Charles E. Richstein.)
don't know whether he had any duties around there as a vocational training student. I was not his immediate supervisor. As far as I know he was working there every day. I couldn't tell you how much work he did in a day's time. [95]

Mr. EVANS.—The defendant rests.

Mr. SMITH.—The plaintiff rests, Your Honor.

Mr. EVANS.—At this time we wish to renew our motion for a directed verdict on the ground that the evidence of the plaintiff and all of the evidence is insufficient to support a verdict.

The COURT.—The motion will be overruled.

Mr. EVANS.—I don't believe I noted an exception to the ruling of the Court on the motion for a directed verdict at the close of the plaintiff's case. Will you please note that exception.

The COURT.—You may.

Mr. EVANS.—An exception is hereby made to the ruling of the Court on motion for a directed verdict for the reason and on the ground that there is no substantial evidence in the record that the plaintiff became totally and permanently disabled on the date mentioned in the petition, or at any other time, and for the further reason that, assuming that all the evidence is true as given herein, such evidence is not the sufficient basis to support a finding of permanent and total disability. The

defendant wishes also to make an exception to the remarks of the Court to the witness, Dr. Treacy, in the presence of the jury for the reason that the same is prejudicial and does not state the correct definition of permanent total disability. [96]

The Court.

You are instructed that in civil cases the affirmative of the issues must be proved, and that when the evidence is contradictory, the decision must be made according to the preponderance of the evidence; and that in this case, it devolves upon the plaintiff to prove his claim by a preponderance of the evidence.

By a preponderance of the evidence is meant the greater weight. The preponderance of the evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest (if any) in the result of the suit; the probability or improbability of the truth of their several statements, in view of all of the other evidence, facts and circumstances proved on the trial; and from all these circumstances, determine upon which side is the weight or preponderance of the evidence.

As you have noted, by preponderance is meant the greater weight of the evidence. If you should find the evidence evenly divided, then there would not be a preponderance of the evidence as defined to you, and you should find for the defendant.

You are instructed that this is an action brought under the War Risk Insurance Act and is in the nature of an action on a contract for insurance. For the purpose of determination of this action, it must be taken as conceded that the plaintiff did enter into a contract with the defendant to insure him in the sum of Ten Thousand Dollars against death or total permanent disability suffered or contracted while said policy of insurance was in effect, which policy was payable upon maturity, in the sum of Fifty-seven Dollars and Fifty Cents per month, and if you believe that Carl R. Francis became totally and permanently disabled on or before the 30th day of April, 1919, the date on which his policy would have expired (or on May 11th, 1918, the date on which he was wounded), then his insurance policy matured upon the date when he became [97] totally and permanently disabled as defined in these instructions, and would therefore, be due and payable to this plaintiff from the date upon which he became so totally and permanently disabled at the rate of Fifty-seven Dollars and Fifty Cents per month for each and every month elapsing since the date he became totally and permanently disabled, not to exceed the sum of Ninety-two Hundred Dollars.

You are instructed that you are to consider the term "Total Disability" as any impairment of mind or body, which renders it impossible for the insured to follow continuously a substantially gainful occupation without seriously impairing his health, and that said total disability is to be considered by you as permanent when it is of such nature as to render it reasonably certain that it will continue throughout the lifetime of the insured.

The word "impossible" must be given a rational meaning; it cannot fairly be said that it is possible for an insured to work because under the stimulus of strong will power it is physically possible for him to stick to a task, if the work is done at the risk of substantially aggravating his condition or seriously impairing his health.

The word "continuously," as used in the definition of permanent total disability, is construed as meaning with reasonable regularity, in contradistinction to following a gainful occupation spasmodically. The word "continuously" does not mean every day or some definite fixed period, as a year, or a month, but rather means a substantial portion of time.

A man is permanently and totally disabled if he is unable without injury to his health to make his living by work.

You are instructed that if you should find from the evidence that Carl R. Francis became totally and permanently disabled as defined in these in-

structions, from on or prior to the 11th day of May, 1918 (the date on which he was wounded), and remained so totally and permanently disabled thereafter, that then his insurance did not lapse on April 30th, 1919, nor on any other date, for nonpayment of premiums.

You are instructed that in determining whether the said Carl R. Francis is totally disabled, you may take into consideration his previous occupation, learning and experience, in so far as it is shown in evidence. [98]

You are instructed that a thing once proved to exist is presumed to continue as long as usual with things of that nature.

If you believe that any witness who has testified in this case has knowingly and wilfully testified falsely concerning any matter or fact material to the elements of the cause of action charged herein, as defined in these instructions, his or her testimony is to be distrusted by you as to all other matters and facts as to which he testified.

You may not arbitrarily and capriciously disregard testimony of a witness who is not impeached in any of the usual modes known to the law, but whose testimony is reasonable and consistent with all the circumstances proved, bearing upon the material issues involved in this case.

The usual modes of impeachment of a witness, known to the law, as mentioned in the preceding instructions, are:

1. By proving contradictory statements previously made by the witness as to matters relevant to his testimony in the case;

2. By disproving facts testified to by him; and

3. By evidence as to his general bad character.

But whether a witness has been impeached is solely for the jury to determine from all the evidence in the case.

The direct evidence of one witness who is entitled to full credit is sufficient proof of any fact in this case.

A witness entitled to full credit is one whose statements upon the witness stand are within reason and believable.

You are the sole judges of the effect, value and weight of the evidence in this case, and of the credibility of the witnesses. It is solely and exclusively your duty to determine the facts, and this you must do from the evidence presented to you, and then apply the law as given you in these instructions to the facts as you find them.

Every witness who has testified in this case is presumed to have spoken the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by contradictory evidence.

In determining the credibility of any witness, you are to take into account, in weighing his testimony, his interest or want of interest in the result of the

case, his appearance upon the witness stand, his manner of testifying, his apparent candor or want of candor, his intelligence or lack of intelligence, [99] his means of knowledge as to any fact about which he testified, his apparent fairness or lack of fairness, and whether he is supported or contradicted by the facts and circumstances in the case as shown by the evidence.

In determining what are the facts in this case you are not bound to decide in conformity with the statements of any number of witnesses not producing conviction in your minds against a less number, or against other evidence satisfying your minds, or against a presumption created by law.

In determining what are the facts in this case and what verdict, if any, you should return, you will take into consideration only the testimony of the witnesses upon the witness stand in this case and such documentary evidence and exhibits as have been admitted.

You must not allow yourselves to consider or be in any manner influenced by anything which you may have seen, heard or read outside of the evidence and exhibits in this case.

Your verdict must be based solely upon the evidence and instructions of the Court presented and read to you in the course of the trial.

By no remark by the Court during the trial, nor by these instructions or otherwise, does the Court or did the Court express any opinion as to the

facts in the case. It is for you and not the Court to determine what the facts are.

You should not give any weight to statements of counsel heretofore made to you, which are not supported by the evidence presented to you and by the instructions of the Court. Counsel are, however, privileged to argue and comment upon the law as given you in these instructions, in their arguments to you.

Testimony has been given by certain witnesses who, in law, are termed experts, and in this connection, you are advised that, while in cases such as the one being tried, the law receives the evidence of men expert in certain lines as to their opinions derived from their knowledge of particular matters, the ultimate weight which is to be given to the testimony of expert witnesses is a question to be determined by the jury, and there is no rule of law which required you to surrender your own judgment based upon credible evidence to that of any person testifying as an expert witness; in other words, the testimony of an expert, like that of any other witness, is to be received by you and given such weight as you think it is properly entitled to. [100]

The value of such testimony depends upon the circumstances of each case, and of these circumstances, the jury must be the judges. When expert witnesses testify to matters of fact, from personal knowledge, then their testimony as to such facts within their personal knowledge should be con-

sidered the same as that of any other witnesses who testify from personal knowledge.

It is your duty to weigh all the evidence, and reconcile it, if possible; but if you find irreconcilable conflict in the evidence, then you should take the evidence which you consider worthy of credit, and give it such weight, under the rules of law submitted to you by the Court, as you believe it is entitled to receive.

It takes twelve of your number, concurring, to agree upon any verdict which you may return in this case.

When you retire to your jury room, you should select one of your number as foreman.

The Court. Are there any exceptions to the instructions?

Mr. Smith. None for the plaintiff.

Mr. Evans. None for the defendant.

Whereupon the jury retired to deliberate upon their verdict and subsequently returned into Court their verdict and subsequently judgment was ordered and entered.

Which were all proceedings had and testimony adduced upon the trial of said cause.

And afterward the Court, made an order granting to the defendant an extension of ninety days from June 9th, 1932, in which to prepare and serve a draft of its proposed bill of exceptions herein.

And now comes defendant, the United States of America, and submits the foregoing, its proposed bill of exceptions in this cause.

Dated this 1st day of September, 1932.

WELLINGTON D. RANKIN,
United States Attorney.
D. L. EGNEW,
Assistant United States Attorney.
D. D. EVANS,
Attorney, Veterans Administration,
Attorneys for Defendant.

Service of the foregoing bill of exceptions and receipt of a copy thereof is hereby acknowledged and accepted this 6th day of September, 1932.

PHILIP SAVARESY &
GEORGE S. SMITH,
Attorneys for Plaintiff. [101]

[Title of Court and Cause.]

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

This is to certify that the foregoing bill of exceptions tendered by the defendant, with the amendments thereto made, as stipulated for by counsel for the plaintiff and defendant, is correct in every particular and is hereby settled and allowed as the bill of exceptions herein and made a part of the record in this cause.

Dated this 30th day of September, 1932.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed Sept. 3, 1932. C. R. Garlow, Clerk. [102]

That on September 2, 1932, Petition for Allowance of Appeal was duly filed herein, which is in the words and figures following, to-wit: [103]

[Title of Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL.

The Honorable, the District Court of the United States in and for the District of Montana:

Comes now the United States of America, defendant above named, and petitions the Court for an appeal herein, and respectfully represents that on the 17th day of June, 1932, a final judgment was rendered and entered herein ordering and adjudging that the plaintiff herein do have and recover of and from the defendant United States of America, the sum of $9,200.00.

That the United States conceiving itself aggrieved by the judgment aforesaid respectfully represents that certain errors were committed in the said judgment and proceedings had prior thereto, to the prejudice of said defendant United States of America, all of which more fully appears from the assignment of errors, which is filed herewith;

WHEREFORE, the defendant United States of America prays that an appeal be allowed it from the District Court of the United States for the District of Montana to the United States Circuit Court of Appeals for the Ninth Circuit, and that a citation issue as provided by law and that transcript of record, proceedings and papers upon which said judgment was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting in the City and County of San Francisco, State of California, and that said judgment be reversed, set aside and held for naught. [104]

Dated this 2nd day of September, 1932.

WELLINGTON D. RANKIN,
United States Attorney,
D. L. EGNEW,
Assistant United States Attorney,
D. D. EVANS,
Insurance Attorney Veterans' Administration,
Attorneys for Defendant.

[Endorsed]: Filed Sept. 2, 1932. C. R. Garlow, Clerk. [105]

That on September 2, 1932, Order Allowing Appeal was duly filed herein, which is in the words and figures following, to-wit: [106]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Upon reading and considering the foregoing petition for allowance of an appeal together with the assignments of error on file herein;

IT IS HEREBY ORDERED that the appeal of the United States of America from the judgment entered in the above entitled Court and cause on the 17th day of June, 1932, be and the same is hereby allowed, and it appearing that said appeal is being brought by the United States, the same shall operate as a supersedeas.

Dated this 2nd day of September, 1932.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed Sept. 2, 1932. C. R. Garlow, Clerk. [107]

That on September 2, 1932, Prayer for Reversal was duly filed herein, which is in the words and figures following, to-wit: [108]

[Title of Court and Cause.]

PRAYER FOR REVERSAL.

Comes now the defendant United States of America, in the above entitled action and prays that the final judgment entered herein in the District Court of the United States for the District of Montana, on the 17th day of June, 1932, be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further orders as may be fit and proper in the premises be made in the above entitled cause by said Circuit Court of Appeals.

Dated this 2nd day of September, 1932.

WELLINGTON D. RANKIN,
United States Attorney,
By D. L. EGNEW,
Assistant United States Atorney,
D. D. EVANS,
Insurance Attorney Veterans' Administration,
Attorneys for Defendant.

[Endorsed]: Filed Sept. 2, 1932. C. R. Garlow, Clerk. [109]

That on September 2, 1932, Assignment of Errors was duly filed herein, which is in the words and figures following, to-wit: [110]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the United States of America, defendant and appellant in the above entitled action, and files the following Assignment of Errors upon which it will rely in the prosecution of its appeal from the judgment in said suit made and entered by the above entitled Court on the 17th day of June, 1932.

1. The Court erred in denying the defendant's motion to direct a verdict in favor of said defendant, which motion was made at the close of the plaintiff's case for the reasons that:

a. The evidence presented by the plaintiff was not sufficient to sustain a verdict in his favor;

b. The evidence did not show permanent and total disability on or before April 30, 1919, as required to permit the plaintiff to recover;

c. The evidence viewed in the light most favorable to the plaintiff does not reasonably lead to the conclusion that Carl R. Francis was permanently and totally disabled on or before April 30, 1919, because the evidence affirmatively shows that he had been following continuously the substantially gainful occupation of a cook and waiter since April 30, 1919, and up to the time of the trial. It was not shown that he suffered any loss under the insurance

contract in that he was able to and did follow the substantially gainful occupation of cook and waiter as continuously after the lapse of his insurance as before the application for insurance.

2. The Court erred in overruling the renewed motion for [111] a directed verdict made by the defendant at the close of all of the evidence for the same reasons enumerated and set forth in specification No. 1, and for the further reason that all of the evidence and the written admissions of the plaintiff and the medical evidence of the defendant conclusively show that the plaintiff at the time of the trial of the action was not permanently and totally disabled and therefore could not have been permanently and totally disabled on April 30, 1919, or at any intervening date and all the evidence conclusively shows that the work done by the plaintiff was continuous, was gainful, was employment, was not detrimental to his health, was never total except for a few weeks at a time, and that such total disability was never conclusively shown to be permanent. The evidence that the plaintiff worked nine years and eleven months out of twelve years' elapsed time at an occupation which returned to him more than $15,000.00 during that time, is so overwhelming as to leave no room to doubt that the plaintiff had ability during that time to follow continuously a gainful occupation and to be inconsistent with the hypothesis that he was suffering from an impairment of mind or body that could, would and did prevent him from following any substan-

tially gainful occupation during the twelve years covered by the evidence.

3. The Court erred in propounding the qeustion: "Suppose he is able to work for two years and eight months, and the evidence should show that, while he has been employed we will say continually, he has not been able to work continuously. Suppose occasionally and at frequent periods he has been ill from the cause you describe and as stated has not been up for three or four days at a time, and frequently during that entire period, other good natured and friendly men and women have done his work for him; that he had frequent fainting spells, as testified, then what would you say to this?" to the witness, Dr. Treacy, in the presence of the jury in that said remarks and question were: improper and prejudicial in that:

a. The jury was led to believe that the loss of one [112] month each year on account of sickness would constitute permanent total disability;

b. The jury was led to believe that a man who follows a gainful occupation for two years and eight months and draws pay for that time was not following continuously a substantially gainful occupation because at frequent periods he had been ill and had been in bed for three or four days at a time and because during that period other good natured and friendly men and women had done his work for him and because he had had frequent fainting spells;

c. The jury was led to believe that if the plaintiff was able to work for two years and eight months continually, it was not necessarily evidence that he was able to work continuously under the meaning of the definition of permanent total disability.

4. The Court did not correct this error in his instructions, although given an opportunity to do so by the exception of the defendant made before instructions as follows: "The defendant wishes to make an exception to the remarks of the Court to the witness, Dr. Treacy, in the presence of the jury for the reason that the same is prejudicial and does not state the correct definition of permanent total disability." The jury is led to believe that the specific evidence in the instant case in the mind of the Court was overwhelming that the plaintiff was "not able to work continuously" and in effect this was a direction of a verdict for the plaintiff and against the defendant.

5. The Court erred in discussing the evidence in its relation to the definition of permanent total disability in the presence of the jury to the witness, Dr. Treacy, and in not correcting the error, if it was error, by a discussion of the concrete evidence in the case to the jury in his instructions, which the Court had a right to do and which it was his duty to do, having previously discussed the same evidence in [113] relation to the definition of permanent total disability.

WHEREFORE, the defendant prays that the judgment be reversed.

WELLINGTON D. RANKIN,
U. S. District Attorney
For the District of Montana.
By D. L. AGNEW,
Assistant U. S. District Attorney.
D. D. EVANS,
Chief Attorney,
Veterans Administration,
(Attorneys for the Defendant).

[Endorsed]: Filed Sept. 2, 1932. C. R. Garlow, Clerk. [114]

That on September 3, 1932, stipulation extending time to and including November 7, 1932, in which to prepare and file a bill of exceptions herein, was duly filed herein, being as follows, to-wit: [115]

[Title of Court and Cause.]

STIPULATION.

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the plaintiff and the defendant respectively, that the defendant may have, in addition to the time heretofore allowed by the Court, to and including November 7th, 1932, in which to prepare and file its bill of exceptions herein.

Dated this 1st day of September, 1932.

PHILIP SAVARESY,
GEORGE S. SMITH,
Attorneys for Plaintiff.
WELLINGTON D. RANKIN,
United States Attorney.
By D. L. AGNEW,
Asst. U. S. Atty.,
Attorneys for Defendant.

[Endorsed]: Filed Sept. 3, 1932. C. R. Garlow, Clerk. [116]

That on September 7, 1932, citation on appeal was duly filed herein, which original citation is hereto annexed, being as follows, to-wit: [117]

[Title of Court and Cause.]

CITATION ON APPEAL.

The President of the United States of America to Carl R. Francis, and Philip Savaresy and George S. Smith, Attorneys for said plaintiff, GREETING:

You and each of you are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal filed in the District Court of the United States for the District

of Montana from the District Court of the United States for the District of Montana to the United States Circuit Court of Appeals for the Ninth Circuit in a suit wherein the United States of America, is defendant and appellant and you Carl R. Francis are the plaintiff and appellee to show cause, if any there be, why the judgment rendered on the 17th day of June, 1932, against the United States of America mentioned in said appeal, should not be corrected and reversed, and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the City of Great Falls, in the District Court of the United States for the District of Montana, this 2nd day of September, 1932.

CHARLES N. PRAY,
Judge. [118]

Personal service of the foregoing citation on appeal, petition for allowance of appeal, prayer for reversal, assignment of errors and order allowing appeal, and receipt of copies thereof admitted this 6th day of September, 1932.

PHILIP SAVERESY &
GEORGE S. SMITH,
Attorneys for Plaintiff. [119]

[Endorsed]: Filed Sept. 7, 1932, C. R. Garlow, Clerk. [120]

Thereafter, on November 12, 1932, Praecipe for Transcript was duly filed herein, being in the words and figures, following, to-wit: [121]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT.

To the Clerk of the above-entitled Court:

You will please prepare a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above-entitled cause, and incorporate in such transcript of record the following papers as exhibits:

1. Complaint.
2. Answer.
3. Bill of exceptions signed, settled and allowed herein.
4. Verdict.
5. Judgment.
6. Petition for allowance of appeal.
7. Order allowing appeal.
8. Prayer for reversal.
9. Assignment of errors.
10. Citation on appeal.
11. This praecipe with acknowledgment of service thereon.
12. Stipulation entered extending time to November 7, 1932, to lodge defendant's proposed bill of exceptions.

Said transcript to be fully certified by you as required by law and the rules of the above-entitled Court, and the rules of [122] the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 9th day of November, 1932.

WELLINGTON D. RANKIN,
United States Attorney.
D. L. EGNEW,
Assistant U. S. Attorney.
D. D. EVANS,
Insurance Attorney.

Service of the foregoing praecipe and receipt of copy admitted this 9th day of November, 1932.

PHILIP SAVARSEY &
GEORGE S. SMITH,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 12, 1932. C. R. Garlow, Clerk. [123]

That on September 30, 1932, an Order was duly made and entered herein extending time to and including November 1, 1932, in which to file transcript on appeal in the Circuit Court of Appeals, which is as follows, to-wit: [124]

[Title of Court and Cause.]

ORDER.

Upon application of appellant and good cause therefor appearing,

It is hereby ordered, that the time within which appellant in the above entitled case, now on appeal from the United States District Court for the District of Montana, may file its Transcript on Appeal and docket the above case in the Circuit Court of Appeals for the Ninth Circuit is hereby extended to and including the 1st day of November, A. D. 1932.

Dated this 30th day of September, 1932.

CHARLES N. PRAY,
Judge.

Entered Sept. 30, 1932. C. R. Garlow, Clerk. [125]

That on October 31, 1932, an order was duly made and entered herein extending time to and including December 1, 1932, in which to file transcript on appeal in the Circuit Court of Appeals, which is as follows, to-wit: [126]

[Title of Court and Cause.]

ORDER.

Upon application of appellant and good cause therefor appearing,

It is hereby ordered, that the time within which appellant in the above-entitled case, now on appeal from the United States District Court for the District of Montana, may file its transcript on appeal and docket the above case in the Circuit Court of

Appeals for the Ninth Circuit is hereby extended to and including the 1st day of December, A. D. 1932.

Dated this 31st day of October, 1932.

CHARLES N. PRAY,
Judge. [127]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana.—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 128 pages, numbered consecutively from 1 to 128, inclusive, is a full, true and correct transcript of the record and proceedings in the within entitled cause, and all that is required by praecipe filed, to be incorporated in said transcript, as appears from the original records and files of said court in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original Citation issued in said cause.

I further certify that the costs of said transcript of record amount to the sum of $24.55, and have

been made a charge against the appellant, the United States of America.

Witness my hand and the seal of said court at Helena, Montana, this 21st day of November, 1932.

[Seal] C. R. GARLOW,
Clerk as aforesaid.
By H. H. WALKER,
Deputy. [128]

[Endorsed]: No. 7010. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, v. Carl R. Francis, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed November 25, 1932.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7010

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATE OF AMERICA,

Appellant,

vs.

CARL R. FRANCIS,

Appellee.

Brief of Appellant

WELLINGTON D. RANKIN,
United States Attorney for the District of Montana.
D. L. EGNEW,
Assistant United States Attorney.
SAM D. GOZA, Jr.,
Assistant United States Attorney.
D. D. EVANS,
Chief Attorney,
U. S. Veterans Administration,

Attorneys for Appellant.

INDEX

CASES CITED

No. 7010

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATE OF AMERICA,

Appellant,

vs.

CARL R. FRANCIS,

Appellee.

Brief of Appellant

WELLINGTON D. RANKIN,
United States Attorney for the
District of Montana.

D. L. EGNEW,
Assistant United States Attorney.

SAM D. GOZA, Jr.,
Assistant United States Attorney.

D. D. EVANS,
Chief Attorney,
U. S. Veterans Administration,

Attorneys for Appellant.

STATEMENT OF THE CASE

This is an action in which the plaintiff sought to secure payment from the United States of America on a certain War Risk Insurance Contract in the sum of $10,000.00. The case was tried on June 9, 1932, before the Court with a jury. The jury returned a verdict for the plaintiff, finding that the plaintiff became permanently and totally disabled on May 10, 1918. Judgment was rendered for the plaintiff on June 17, 1932, from which judgment the defendant appeals.

The undisputed facts in this case are that Carl R. Francis, the plaintiff in this action enlisted in the Army of the United States on July 28, 1917, and that on January 22, 1918, he made application for, and was granted by the Bureau of War Risk Insurance, a contract of $10,000.00 insurance payable to him in the event of permanent total disability and to his beneficiary in case of death, in installments of $57.50 per month. He was discharged from the Army on December 23, 1918, and continued to pay his premiums on said insurance for the months of January and February and March, but failed and neglected to pay the premium due April 1, 1919 and the insurance lapsed and was cancelled for nonpayment of premium due for the month of April on May 1, 1919. He was wounded by a piece of shrapnel on the night of May

10, 1918, while acting as a guide for the 2nd Platoon of A Company, 16th Infantry, back of the town of Buray, France. He was therefore taken to hospitals and treated until the time of his discharge. He made a claim to the United States Veterans' Bureau and this claim was denied and the Court has jurisdiction of this action.

(Title of Court and Cause)

ASSIGNMENT OF ERRORS

Comes now the United States of America, defendant and appellant in the above entitled action, and files the following Assignment of Errors upon which it will rely in the prosecution of its appeal from the judgment in said suit made and entered by the above entitled Court on the 17th day of June, 1932.

1. The Court erred in denying the defendant's motion to direct a verdict in favor of said defendant, which motion was made at the close of the plaintiff's case for the reasons that:

(a.) The evidence presented by the plaintiff was not sufficient to sustain a verdict in his favor.

(b.) The evidence did not show permanent and total disability on or before April 30, ~~1920~~ 1919, as required, to permit the plaintiff to recover.

(c.) The evidence viewed in the light most favor-

able to the plaintiff does not reasonably lead to the conclusion that Carl R. Francis was permanently and totally disabled on or before April 30, 1919, because the evidence affirmatively shows that he had been following continuously the substantially gainful occupation of a cook and waiter since April 30, 1919, and up to the time of the trial. It was not shown that he suffered any loss under the insurance contract in that he was able to and did follow the substantially gainful occupation of cook and waiter as continuously after the lapse of his insurance as before the application for insurance.

2. The Court erred in overruling the renewed motion for a directed verdict made by the defendant at the close of all of the evidence for the same reasons enumerated and set forth in specification No. 1, and for the further reason that all of the evidence and the written admissions of the plaintiff and the medical evidence of the defendant conclusively show that the plaintiff at the time of the trial of the action was not permanently and totally disabled and therefore could not have been permanently and totally disabled on April 30, 1919, or at any intervening date and all the evidence conclusively shows that the work done by the plaintiff was continuous, was gainful, was employment, was not detrimental to his health, was never total except for a few weeks at a time, and that such total disability was never conclusively shown to be

permanent. The evidence that the plaintiff worked nine years and eleven months out of twelve years' elapsed time at an occupation which returned to him more than $15,000.00 during that time, is so overwhelming as to leave no room to doubt that the plaintiff had ability during that time to follow continuously a gainful occupation and to be inconsistent with the hypothesis that he was suffering from an impairment of mind or body that could, would and did prevent him from following any substantially gainful occupation during the twelve years covered by the evidence.

3. The Court erred in propounding the question: "Suppose he is able to work for two years and eight months, and the evidence should show that, while he has been employed we will say continually, he has not been able to work continuously. Suppose occasionally and at frequent periods he has been ill from the cause you describe and as stated has not been up for three or four days at a time, and frequently during that entire period, other good natured and friendly men and women have done his work for him; that he had frequent fainting spells, as testified, then what would you say to this?" to the witness Dr. Treacy, in the presence of the jury in that said remarks and question were: improper and prejudicial in that:

(a) The jury was led to believe that the loss of one month each year on account of sickness would constitute permanent total disability;

(b) The jury was led to believe that a man who follows a gainful occupation for two years and eight months and draws pay for that time was not following continuously a substantially gainful occupation because at frequent periods he had been ill and had been in bed for three or four days at a time and because during that period other good natured and friendly men and women had done his work for him and because he had had frequent fainting spells;

(c) The jury was led to believe that if the plaintiff was able to work for two years and eight months continually, it was not necessarily evidence that he was able to work continuously under the meaning of the definition of permanent total disability.

4. The Court did not correct this error in his instructions, although given an opportunity to do so by the exception of the defendant made before instructions as follows: "The defendant wishes to make an exception to the remarks of the Court to the witness, Dr. Treacy, in the presence of the jury for the reason that the same is prejudicial and does not state the correct definition of permanent total disability." The jury is led to believe that the specific evidence in the instant case in the mind of the Court was overwhelming that the plaintiff was "not able to work continuously" and in effect this was a direction of a verdict for the plaintiff and against the defendant.

5. The Court erred in discussing the evidence in its relation to the definition of permanent total disability in the presence of the jury to the witness, Dr. Treacy, and in not correcting the error, if it was error, by a discussion of the concrete evidence in the case to the jury in his instructions, which the Court had a right to do and which it was his duty to do, having previously discussed the same evidence in relation to the definition of permanent total disability (Tr. 145-148).

ISSUES OF LAW

There are two main issues of law to be decided in this case:

First, was the Court in error in denying the defendant's motion to direct a verdict made at the close of the plaintiff's case and also renewed at the close of all of the evidence, as set forth in Assignment of Errors, numbers 1 and 2 (Tr. 145-6).

Second, was the Court in error in his statement of law as to the definition of permanent total disability as given in his question to the witness, Dr. Treacy, and in his instructions to the jury as set forth in Assignment of Errors, numbers 3, 4 and 5 (Tr. 147-8).

ARGUMENT

"Unless there is substantial testimony to sustain the verdict" that Carl R. Francis became permanently and totally disabled and suffered an impairment of mind or body that prevented him from following any substantially gainful occupation on or before May 1, 1919, (Tr. 17), the Court was in error in denying the motions of the defendant for a directed verdict.

> "Partial disability is not sufficient, nor total temporary disability."
> United States v. Hill (C. C. A. 9), 61 Fed. (2d), 651, citing:
> United States v. Golden (C. C. A. 10), 34 Fed. (2d), 367
> United States v. Thomas (C. C. A. 4), 53 Fed. (2d) 192
> United States v. McLaughlin (C. C. A. 8), 53 Fed. (2d) 450
> Gunning v. Cooley, 281 U. S. 90.

A review of the evidence of the appellee shows that he suffered from a wound incurred while insurance was in force and that this wound resulted in a partial disability for a few hours and a temporary total disability practically all of the time until his discharge from the Army, and a partial disability which was permanent in character at all times after his discharge from the Army. This is admitted and is unquestioned by the appellant. A physical examination at the time

of his discharge from the Army indicates that he was suffering from a thirty percent (partial) disability. This was unquestionably permanent and would disable him to a partial degree during the balance of his lifetime. Whether it was permanently and totally disabling, however, is the real question at issue, not whether it was either totally disabling at times or permanently disabling in a partial degree, but whether the totality and the permanence were coincident before May 1, 1919.

The only evidence of the impairment existing before May 1, 1919, which may be considered as substantial is the testimony of the appellee and the documentary evidence introduced in his cross examination taken together with the physical appearance of the wound itself. This is evidence of an "impairment of mind or body." Dr. Allard, a nationally known orthopedist, describes his impairment or disability as observed by him on January 15, 1924 in a manner that will give a correct picture of the disability and injury suffered by the appellee. Dr. Allard says (Tr. 122):

> "The subject is a well-muscled, symmetrically developed individual, with straight limbs, normal spine, square, symmetrical shoulders and normal joints and feet. The muscles are normal in tone and range of action, *except slight atrophy of the muscles of the left arm and forearm, and slight limitation in abduction of the left arm at the shoulder.* Four well-healed scars, the result of a wound

received in action, are noted on the left thorax, as follows:

"1st, an irregular, key-shaped scar, 4 inches in length, with a 4-inch cross scar, averaging about 1¼ inch in width, situated at a point bisecting a line drawn from the nipple to the middle of the left clavicle. *This scar is adherent to the pectoral muscle and covers a bony irregularity in the 2nd, 3rd and 4th ribs.*

"2nd, a scar ½ inch wide, extending downward and forward for 3½ inches from the lower angle of the scalpula. *This scar is adherent to the subcuticular tissue.*

"3rd, a triangular scar with the apex at the posterior axillary fold, extending backward 2 inches to a 1-inch base.

"4th, an irregular scar, 3 inches in length, averaging 1¼ inches in width, situated in the axilla, *and adherent to the subcuticular tissue.*

"All scars are well healed. *The contracted biceps of the left arm measure 1 inch less than the right arm.* The forearm has most prominent circumference; *also measures 1 inch less on the left side.* There is *diminished sensation* in the region of the small, internal, *cutaneous nerve of the left arm.* There is a large varicocele and a very pendulous bag. Diagnosis: Well-healed gunshot wound left thorax, left varicocele. Slight atrophy in the left arm and forearm." (Italics ours.)

We have then a scar from the left nipple under the arm to the middle of the scalpula with cross scars, adherent to muscle and bone in places, with roughening of the bone, no loss of bone substance, a one-inch atrophy of the muscles of the left arm, allowing noth-

ing for the natural difference of a left arm in a right handed person, and some loss of sensation in the cutaneous nerve. This is the physical impairment demonstrable to the court and jury.

The testimony of the appellee shows that he was wounded; that he was operated on under ether some six times and under a local anesthetic several times; that the shrapnel was taken out; that he had to have a blood transfusion; that it caused him a great deal of pain and that he didn't really get the use of his left arm until he got to Des Moines, Iowa; that he was a bed patient for two months or two months and one-half after he had the shrapnel removed. He testified that he had empyema or pus on the lungs and that he stayed in the hospital until a day or two before his discharge from the Army. Appellee then offered the report of physical examination, Exhibit B, which describes the wound as:

> "Shell fragment wound left chest anterior, left axilla and lower angle of scapula posterior. Adhesions throughout left chest as a result. In view of occupation he is thirty (30) per cent disabled." (Tr. 25-26.)

He states that he has been paid compensation on:

> "Different percentages of disability awarded me, from 20% to total. At the present time I am getting $66.00. I imagine that means 66%.

* * *

> After I was discharged from service I went to my father's home which was at that time at Walls, Oklahoma. I stayed there for about six months.
>
> * * *
>
> While there I didn't do any work at all. I was not able to do any." (Tr. 28.)

THE APPELLEE WAS NOT PERMANENTLY AND TOTALLY DISABLED WHEN HIS INSURANCE LAPSED.

If the appellee had stopped at this point, the above might have been substantial evidence to sustain a finding of permanent total disability by the jury. He did not do so, however, but proceeded to give evidence of a work record which shows that the day before his insurance lapsed, to-wit, on April 3, 1919 (4½ months, not 6 months after his discharge), he started working as a waiter (his prewar occupation) for the Wide-Awake Cafe at Fort Smith, Arkansas at $65.00 per month and board and worked for six weeks; (Tr. 29) that he then went to Montana, working five days at Cheyenne, Wyoming in the month of July, and then went to Miles City, Montana, and worked as a waiter in Miles City from about September 1, 1919, until February 5, 1920 (Tr. 29 and 47). In February of 1920 he started vocational training. The purpose of this vocational training, inferred from the evidence and from the law of which the Court will take judi-

cial notice, was the education of the appellee in an occupation which he could follow despite the handicap of the wound which he had received in the service of the United States.

The occupation of waiter and cook had been followed prior to the war by the appellee, as shown by his statement (Tr. 51) from November, 1916 to August, 1917, paying him wages of $35.00 per week and board.

THE PLAINTIFF HAS RECEIVED MORE THAN $17,000 IN PAY SINCE HIS DISCHARGE FROM THE ARMY.

The evidence shows that throughout the year 1920 he received a maintenance allowance from the Government which was $80.00 per month until August, and $152.50 per month after August, and that his training consisted of work at the State College at Bozeman and theoretical instruction as well as practical instruction in bread baking in the Dunwoody Institute in Minneapolis and then practical work with the Purity Bread Company and the Nichols Bakery and then work as a cook at the Metropolitan Cafe and the Main Cafe in Billings, Montana (Tr. 30-34). This training apparently required about the same character of physical ability and freedom from impairment as the follow-

ing of the occupation itself required. His testimony was that he left training September 1, 1922 and that he started working for the Shelling's Cafe in Billings in December of 1922 (Tr. 52). However, Exhibit D (Tr. 46) shows that from September 15, 1922 to December 1, 1922 he worked as a waiter and continued working as a waiter until May 13, 1923, when he accepted work as a cook with the Shelling's Cafe. (Note: Exhibit D was executed on August 15, 1923, and therefore is the best evidence of the exact time.) He must have left the Shelling's Cafe sometime after August 15, 1923, and worked for the Metropolitan or the Luzon Cafe as a waiter, or possibly both. (Tr. 35, 47, 53.) It is probable that he was not working for a month or two in the fall of 1923, but all the evidence is clear that beginning January 1, 1924, he worked as a cook for the Ferndale Cafe until the spring of 1931 (Tr. 128), except for the time between August 6, 1926, and July 11, 1927 (Tr. 53). During this time in 1926 and 1927 he worked for the Metropolitan Cafe, the New Bungalow Cafe and the Northern Hotel (Tr. 53). After he voluntarily quit the Ferndale Cafe in 1931 (Tr. 127), he, in partnership with James Buckley, operated a lunch room "down by the sugar factory." (Tr. 39 and 75.) Then he "worked at Casey's at Laurel.—Now I am working at the Billings Golf and Country Club." (Tr. 39.)

Upon cross-examination the plaintiff admitted that

during 1919 he earned about $350.00 and board (Tr. 56); that during 1920 he received $1400.00 as a maintenance allowance from the Government while in vocational training (Tr. 56-7)); that during 1921 he received $1890.00 as training pay (Tr. 57); that during 1922 he earned about $1800.00 (Tr. 58); that during 1923 he earned about $250.00 (Tr. 58); that during 1924 he earned about $1825.00 (Tr. 59); that in 1925 he earned about $1825; (Tr. 59); that in 1926 he earned about $1200.00 (Tr. 59); that he earned about $1685.00 a year during each of the years 1927, 1928, 1929 and 1930 (Tr. 60). This amounts to a total sum of more than $17,000. The record shows that plaintiff had lost not more than twenty-five months during this twelve year period. This is conclusive evidence of the "continuously following of a substantially gainful occupation" of a cook and waiter for a substantial period of time after the alleged permanent and total disability.

United States v. Diehl (C. C. A. 4) 62 F. (2d) 343:

> "It is clear that, in the face of this work record, plaintiff cannot be held to have been totally and permanently disabled between 1918 and 1928. His general statement that he was not able to work regularly cannot be given probative force in the light of uncontradicted testimony that over this long period he did work with reasonable regularity and received substantial remuneration for his work. Harrison v. U. S. (C. C. A. 4th) 49 Fed. (2d) 227; U. S. v. Wilson (C. C. A. 4th) 50

Fed. (2d) 1063; Long v. U. S. (C. C. A. 4th) 59 Fed. (2d) 602; Nicolay v. U. S. (C. C. A. 10th) 51 Fed. (2d) 170; Nalbantian v. U. S. (C. C. C. A. 7th) 54 Fed. (2d) 63; Hirt v. U. S. (C. C. A. 10th) 56 Fed. (2d) 80; U. S. v. McGill (C. C. A. 8th) 56 Fed. (2d) 522; Eggen v. U. S. C. C. A. 8th) 58 Fed. (2d) 616."

Also see United States v. Griswold (C. C. A. 9) 61 F. (2d) 583.

The plaintiff stated that he was unable to do the work required of him as a waiter at Fort Smith, Arkansas (Tr. 29), at the Albin Cafe, Sheridan, Wyoming and at cafes in Miles City, Montana (Tr. 29-31); that he was unable to do the work required while in vocational training at Minneapolis and at the Nichols' Bakery at Billings (Tr. 32-33); and that he was unable to do the work required of him while employed at the Shelling Cafe (Tr. 34), at the Metropolitan Cafe and at the Ferndale Cafe (Tr. 35-37) in Billings.

However the plaintiff's statements of fact are flatly contradicted by his employers. Therefore, all of the statements of the witness are not to be given "full credit" (Court's instruction, Tr. 136). The distinterested witness, A. M. Loomis (Tr. 126) says:

"He performed his services satisfactorily for me. He left my employ because he wanted to take a vacation for a couple of weeks to go to the mountains."

Mrs. Loomis says:

> "I was there in the Ferndale Cafe when Mr. Francis was employed there in 1924 and on up until 1931. * * * * He complained sometimes of having a headache and being tired as a rule. I never saw him faint on the job, and I was there practically every day. * * * * We have always kept two dishwashers and they have always assisted in doing the heavy work. We don't expect our cook to do that work. * * * * He complained of not feeling well and all, but I didn't know he fainted. I am practically all the time we are open between dining room and kitchen. Mr. Francis was a dependable man, and I could depend upon his being there * * * * If it hadn't been for the fact that the work was gotten out at all times I would not have been able to keep him there." (Tr. 128-9.)

THE PHYSICAL FACTS CONCLUSIVELY REFUTE APPELLEE'S CLAIM OF TOTAL PERMANENT DISABILITY.

The appellee's statement concerning his inability to work for the Ferndale Cafe is not substantial evidence of inability and is so contradicted by the testimony of the proprietor, A. M. Loomis (Tr. 126-128) as to render it impossible of belief and unworthy of credence.

U. S. vs. Kerr (C. C. A. 9th) 61 Fed. (2d) 800:

> "The physical facts positively contradicting the statement of a witness, control, and the Court may not disregard them. American Car & Foundry Co. v. Kindermann (C. C. A.) 216 F. 499, 502; Missouri, K. & T. Ry. Co. v. Collier (C. C. A.) 157 F. 347, certiorari denied, 209 U. S. 545, 28 S. Ct. 571, 52 L. Ed. 920. Judgments should not stand upon evidence that cannot be true. Woolworth Co. v. Davis (C. C. A.) 41 Fed. (2d) 342, 347."

This case is also much like the Kerr Case, supra, in that the appellee here says:

> "I cannot lift heavy pots and pans. Others help me and I cannot do the heavy work," (Tr. 33, 37-38),

in the same way that Kerr stated:

> "My leg bothered me since then and it bothers me now. I cannot work without limping. I carry a cane because I can get around better and in case I got to fall I can catch myself better."

Judge Neterer says, in U. S. vs. Kerr, supra:

> "The insurance is not against a lame knee or a knee that 'bothers' or against limping or the use of a cane, but is against total and permanent disability from following continuously a substantially gainful occupation at the time of discharge, and reasonably certain to continue during his lifetime."

It is essential that a plaintiff prove that he suffered

an "impairment of mind or body" during the life of the policy and the nature and extent of this impairment. In a gunshot wound, such as in the instant case, the impairment is evident and the disability therefrom can be estimated by the Court and jury. It would seem, off-hand, that a doctor would be the only witness who was well qualified to speak with authority on a disability, its nature and extent. This rule, however, does not apply in gunshot wounds with the same measure of force that it applies to constitutional diseases. In a gunshot wound the Court and the jury, drawing upon their common knowledge of the human body, its functions and its limitations, are just as able to draw conclusions on all mechanical disabilities as any doctor who might testify as to an opinion. A doctor is not needed to give an apinion that an amputated leg or arm will handicap a man in various occupations, and even if he gives his opinion that the loss of an arm would render this particular man unable to follow continuously any substantially gainful occupation, the Court will take judicial notice that many one-armed men are following occupations of many different kinds in everyday life.

> "* * * * there are a number of occupations open to a partially crippled man." U. S. vs. Thomas (4th Circuit) 53 Fed. (2nd) 192.

In constitutional diseases, however, there is room for expert testimony on the effects of a disability re-

sulting from such a disease. It is, naturally, impossible for the lay person to form an opinion as to the disability suffered from a heart condition, an intestinal condition, a lung condition, a brain disease, or any of the organic diseases of the mind or body. We are here dependent on the testimony of physicians, and their testimony, while expert, is really divided into two disvisions, that is, testimony as to facts, and as to opinion. The X-ray is a great aid to physicians and to courts in giving tangible evidence of the impairment of internal organs, and a physician who can testify strictly as to his opinion of what exists, makes that evidence practically conclusive when he can demonstrate the existence of the condition by an X-ray picture of the impairment.

In this case when Dr. Allard testified as to the appearance of the wound, he was testifying to facts in the same manner as an engineer is called to testify as to the exact width of a road or as to the size of a room. It is true that such testimony is, strictly speaking, the opinion of an expert, but the relative weight to be given such testimony is so apparent as to make in contrast thereto an opinion as to a conclusion by a physician "that the plaintiff is unable to follow any gainful occupation" not expert testimony and of such relative weight as to be not only of no value, but so absurd as to be rejected by the court and jury as obviously false and misleading.

Dr. Allard's testimony for the defendant describing the appellee and the scars (Tr. 122-3) could be immediately verified by any lay witness by a comparison of the description with the man himself upon the witness stand, and of course should be taken as testimony of fact. His testimony that the X-ray taken day before yesterday shows no evidence of a penetrating wound of the lung tissue and that the X-ray picture indicates that the left lung is better than the right lung as to condition (Tr. 125), is a statement of opinion which is backed by real evidence subject to cross examination that there is no disability or impairment of the left lung and should be conclusive against any and all testimony of speculation and conjecture such as is recited in the testimony of Dr. Treacy:

> "This missile perforated his lung, I am positive of that, assuming that he is telling the truth always. I have no occasion to doubt he coughed and spit blood at the time, which he would not have done had it not penetrated the lung. He undoubtedly had a severe internal hemorrhage." (Tr. 92.)

The testimony of Dr. Ferris Arnold, giving diagnoses of a chronic myocarditis and enlargement of the heart, chronic nephritis, a chronic respiratory infection, neurosis and extreme mental despondency, shortness of breath, pulse 120 to 140 on exertion, low specific gravity of urine, rales in chest, casts and albu-

men in urine," (Tr. 82) is not substantial evidence and is unworthy of credence and is no evidence of value because it all relates to the year 1921, more than two years after the lapse of the insurance, and further, it is merely a statement of opinion which is not properly backed by real evidence or any corroboration by records made at the time. The doctor states:

> "I have no office records of my examination and treatment of Carl R. Francis" (Tr. 84).

Contrast this testimony with the testimony of Dr. Fortin:

> "There was no heart condition found in 1926. The heart beat was regular, no murmurs. * * * * There is no urinalysis of record; therefore I do not know whether a urinalysis was made or not. However, there was no complaint on the part of the plaintiff in reference thereto. * * * * I have the complaint here in writing as to what was stated to the doctors. * * * * In 1926 he made no complaint of either kidney or heart trouble." (Tr. 100.)

Compare it also with the testimony of Dr. James I. Wernham:

> "The urine examination was negative. The urine was normal. It is my opinion that in January, 1931, when I examined him he had no kidney disease at that time." (Tr. 108-9.)

Dr. Wernham and Dr. Fortin were testifying from memoranda which had figures and data and memoranda of examinations of the urine, which not only state their opinions, but the physical facts upon which they base such opinions and lend considerable weight to such testimony of opinion.

For the appellee to rely on testimony such as that of Dr. Arnold and that of Dr. Hanley and that of Dr. Treacy, none of which goes back to the date of alleged permanent and total disability with any facts found, when there was available to the appellee evidence of the records of the Adjutant General's Office as to his disability and evidence of an X-ray taken on behalf of the appellee by Dr. Bridenbaugh (Tr. 111), is strongly indicative of an attempt to prove by speculation and conjecture that which, if it existed, was readily and easily proven by concrete, reliable evidence. It is a well established rule of evidence that the court may reject any and all evidence which is secondary; unless the reason for the non-production of the best evidence is clearly shown. It is the contention of the appellant that all of the medical evidence of the appellee as to permanent and total disability existing prior to the lapse of the insurance or at any time, is so disputed by physical facts and so weakened by its own implausibility as to render it not such substantial evidence as would support a verdict.

The appellee presented no evidence whatsoever at

the trial as to his inability to follow any other occupation than his pre-war occupation of cook and waiter. The evidence that he was handicapped in the following of the occupation of cook or waiter is not evidence of permanent and total disability, but on the contrary the evidence that he did follow continuously his pre-war occupation of a cook, or waiter, or both, for ten years, is conclusive evidence of his ability to follow some gainful occupation. The argument is doubly convincing because his pre-war occupation was that of a cook and waiter (Tr. 51).

> "It must be borne in mind that permanent and total disability of the insured to follow his pre-war occupation; he must be disabled from following any substantially, gainful occupation." U. S. vs. Thomas, 53 Fed. (2d) 192, citing U. S. vs. Golden, 34 Fed. (2d) 367; U. S. vs. Law, 299 Fed. 61; Blair vs. U. S. 47 Fed. (2d) 109; U. S. vs. Barker, 36 Fed. (2d) 556; Nicolay vs. U. S. 51 Fed. (2d) 170.
>
> "The claim of the insured does not fail because of intermittent efforts on his part to engage in two-handed occupations, but rather because he offered no substantial evidence to show that he is unable to do the kind of work which a one-armed man can successfully perform. * * * There is no showing at the trial that all of the injuries combined made it impossible for him to follow with reasonable regularity any substantially, gainful occupation. It may be that such evidence is in the possession of the insured, but from the evidence offered to the court it would appear that the insured has made no attempt to take up any call-

ing except two-handed ones, and this failure on his part must be contrasted with testimony of all the physicians in the case, including that of his own doctor, which shows in accordance with the common knowledge open to all, that there are a number of occupations open to a partially crippled man." U. S. vs. Thomas, supra.

No better summary of conclusions on the facts and law can be written by counsel than is set out in a recent case, practically identical in all respects. United States vs. Harth, from the 8th circuit, Judge Van Valkenburgh speaking (61 Fed. 2d 541) discusses the definition, reviewing all of the cases in a most able manner. The soldier, Harth, sustained an inguinal hernia on the right side which was reduced by an operation while the soldier was still in the Army. On September 25, 1918 he received a severe shrapnel wound in the right thigh. The soldier was granted a ten per cent disability by the Board of Review. He was discharged January 28, 1919. He worked for various companies, but principally as checker and packer of plumbing supplies. He was paid $35.00 a week, but during the period of six years he was compelled to lay off only two periods of any length, one of two weeks and one of three weeks, and he says he "was absent from work for short periods in addition to these long ones." His pay during this service aggregated nearly $11,000.00. The Court says:

"There is is in the testimony serious dispute

> as to whether the injury of which appellee complains is permanent, or at least was permanent in its earlier stages. * * * * The sole question then is whether the disability was total while the contract of insurance was in effect. As has been said, that contract lapsed for non-payment of premiums March 4, 1919, unless *total* disability is established prior to that date."

The Court then reviews the principal decisions defining permanent total disability and gives well merited credit to Judge Rudkin of the 9th Circuit for the leading case of United States vs. Rice, 47 Fed. (2nd) 749, that:

> "But we feel constrained to hold that the manual labor performed by the appellee for the period of five years following his discharge from the Army and the compensation received for his services are utterly inconsistent with his present claim that he was permanently and totally disabled before the policy lapsed. * * * * *A finding by the jury that the appellee was unable to do that which he had been doing almost daily for a period of more than five years, is without support in the testimony. In so deciding we are not invading the province of the jury; we are simply declaring the law."* (Italics ours.)

Judge Van Valkenburgh states that:

> "In United States vs. Martin (C. C. A. 5) 54 Fed. (2) 554, * * * the Court found that a wound he had received while acting as a messenger while on the battle front had caused him suffering and

and disability, and had, to some extent, handicapped him in business, thereby entitled him to compensation. However, it was held that 'these considerations, abstractly worthy as they are, may not have the effect in a suit on a contract of giving to plain and undisputed facts a significance contrary to its reasonable meaning'."

The Court then quotes from United States vs. Fly, 58 Fed. (2d) 217:

"It is quite evident that appellee has been, and is, under a considerable handicap because of his condition brought about by his injuries, and is suffering a decided disability which may be permanent. But how can this court say that such disability is total, to the extent that it prevents him from 'following continuously any substantially gainful occupation,' when the undisputed evidence of the appellee, his wife, and his employer agree that he was at the time of trial and for eighteen months had been steadily employed at normal wages and had, in the words of his employer 'performed his work there with me satisfactorily,' with absence of only about a week, caused by sickness? The evident injury to the appellee and the highly meritorious service origin of this injury have inclined us to view this record with lively sympathy, but our duty is to take the evidence as we find it and enforce the rights of these parties as defined by their contract. That contract required total injury before recovery could be lawfully had. This evidence clearly and unmistakably shows no such total injury. The motion for an instructed verdict should have been sustained."

Judge Van Valkenburgh then says:

> "Latterly there have been manifold attempts * * to make this subsequent condition of totality or permanency relate back to a period antedating such lapse. Appeal is made to the sympathy which is quick to respond to the suffering of the soldier, particularly when its cause is of service origin. This sympathy has been expressed in those cases in which work, substantially gainful, by the insured has been excused and overlooked, where it has been deemed seriously to imperil his life or health. Typical of these are cases of tuberculars, as pointed out by Judge Hutcheson in United States vs. Martin, supra, to which may be added those involving afflictions of the heart. Marsh vs. United States, Supra. The category should not appreciably be further extended. It should not be held to embrace cases of incidental pain and suffering resulting in some inconvenience and handicap to business. Such handicaps are suffered by many who work, and must work, to gain a livelihood, without hope of, or title to, compensation."

The Court then quotes Judge Sanborne from Eggen vs. United States, 58 Fed. (2) 616:

> "A total disability which has not become permanent before the lapse of a policy does not mature it, nor does a permanent disability which has not become total. * * * * He can only collect his insurance under such circumstances if he keeps the policy alive by the payment of premiums until his total disability becomes also a permanent disability."

In summing up the Court said:

> "It is to be presumed that any appreciable degree of disability is attended by discomfort, pain, or at least by inconvenience and handicap in the discharge of the normal activities of life. If such conditions are to be deemed sufficient to warrant recovery under the terms of a war risk policy, then the precision with which the degree of disability, necessary for such recovery, has been defined, was wholly unnecessary.
>
> Appellee sustained a severe wound while in service on the field of battle. It is no doubt a serious handicap in the pursuit of a substantially gainful occupation. He is entitled to compensation commensurate with the disability he has suffered. If that he now receives is inadequate, the law provides opportunity for review, and for increase, if that is found to be warranted. * * * * But we cannot approve recovery upon a contract of insurance, the express and crucial terms of which have obviously not been met."

The case at bar is stronger than the Harth case because Harth ceased work in 1926, whereas Francis has worked steadily since 1926 and the evidence is not substantial that at the time of trial he was permanently and totally disabled.

THE COURT ERRED IN PROPOUNDING TO THE WITNESS DR. TREACY A QUESTION NULLIFYING THE EFFECT OF THE GOVERNMENT'S CROSS EXAMINATION.

During the cross examination by the government of the witness, Dr. Treacy the following occurred:

> "Q. But do you believe that a man who follows it for two years and eight months, in accordance with the testimony, and draws pay for that time, is not following continuously a substantially gainful occupation.
>
> A. I believe he was during that period.
>
> Q. You believe that during that period he was continuously following a gainful occupation?
>
> A. Yes.
>
> THE COURT. Suppose he is able to work for two years and eight months and the evidence should show that, while he has been employed, we will say continually, he has not been able to work continuously. Suppose occasionally and at frequent periods he had been ill from the cause you describe, and as stated, has not been up for three or four days at a time, and frequently during that entire period, other good-natured and friendly men and women have done his work for him; that he has had frequent fainting spells, as testified, then what would you say as to this?" (Tr. 97-98.)

After the court had asked this question, Dr. Treacy replied:

> "That is a different question from Mr. Evans'.

> I would say that he was not capable of following a gainful occupation as described by the law, under the circumstances you (the Court) give here." (Tr. 97-98.)

What possible inference could the jury make except that the Court was stating the legal definition of permanent total disability to be applied to the instant case by the jury?

If the Court had let the matter rest when counsel for the defendant had practically nullified the value of the testimony of the witness, Dr. Treacy, by getting the unequivical admission from him that "during the period of two years and eight months the plaintiff was not permanently and totally disabled because he was then," in the opinion of the witness, "continuously following a gainful occupation," there probably would have been no error. That the effect of the admission by the witness was completely nullified by the question of the Court is clearly proved by the fact that plaintiff rested his case at that point.

THE COURT'S ERROR WAS NOT CURED BY PROPER INSTRUCTIONS.

The Court did not correct the prejudicial error committed in its question propounded to Dr. Treacy when under cross examination by the defendant by subsequent general instructions to the jury. The attention of the trial court was directed to what the defendant now assigns as error (Tr. 132). The obvious and prejudicial effect of the colloquy between the witness Dr. Treacy and the Court most clearly appears from the language of the Court in the following case, which indicates the necessity of a specific instruction in the circumstances assigned as error in this case.

Order of United Commercial Travelers of America vs. Nicholson, et al., 9 Fed. (2d) 7, 14:

> "The extent to which the court should go in reviewing and commenting on evidence depends in a great measure on the circumstances of the particular case. In a case such as this in which reliance is placed on expert or opinion evidence, it is important to point out to the jury that the opinion of an expert has no probative force in case the jury fails to find that the facts assumed in the hypothetical question were true, and the court should not permit a jury to be influenced by evidence on which they cannot, within the laws of close reasoning, make a finding. We think the jury in this case might well have been instructed, in considering purely expert testimony and the weight to be attached to it, that it was their duty

> to consider whether the facts embodied in the hypothetical question had been established by a preponderance of the evidence."

It is true that in this respect the Court stated:

> "By no remark by the Court during the trial, nor by these instructions or otherwise, does the Court, or did the Court, express any opinion as to the facts in this case. It is for you and not the Court to determine what the facts are." (Tr. 137.)

The prejudicial remark, however, related to the law rather than to the facts. The Court did not clear up the matter, but rather increased the misapprehension of the jury when it stated that:

> "Testimony has been given by certain witnesses who in law are termed experts, * * and there is no rule of law which requires you to surrender your own judgment based upon credible evidence to that of any person testifying as an expert witness" (Tr. 138)

by adding to that statement:

> "When expert witnesses testify to matters of fact from personal knowledge, then their testimony as to such facts within their personal knowledge should be considered the same as that of any other witnesses who testified from personal knowledge." (Tr. 138.)

This instruction did not define for the jury which evidence of Dr. Treacy was opinion evidence and which evidence was factual evidence, and they had a right to believe that all of his testimony was as to facts rather than as to conclusions and opinion.

Appellant contends that in this case the only possible way of correcting the error alleged was for the Court to refer directly to his remarks and explain them in relation to the correct definition of permanent total disability. Failure to do so, left the jury in the same place as in the case of Cummings vs. Pennsylvania Railway Company, 45 Fed. (2d) 152:

> "* * * * Nothing short of an express repudiation of that charge coupled with a correct statement of the law can be thought to have erased the erroneous impression from the minds of the jurors. The subsequent charge given, not as an express correction and with no attempt to point out to the jury the difference between it and what had previously been said, would, in all probability, have been treated only as a restatement of what had gone before. Quite likely the jury was unaware of any change. At best, it did know of it and was left to take its choice between two inconsistent statements of the law, one of which was wrong and one right. This so deprived the defendant of its right to have the jury plainly and correctly instructed to the end that there should be no misapprehension of the law that the exception to the charge based on this ground must be sustained. Deserant v. Cerillos Coal Railroad Co., 178 U. S. 409, 20 S. Ct. 967, 44 L. Ed. 1127; Memphis Furniture Manufacturing Co. v.

Wemyss Furniture Co. (C. C. A.) 2 F. (2d) 428, 432."

We, therefore, submit that the judgment should be reversed.

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No. 7010

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

CARL R. FRANCIS,

Appellee.

Brief of Appellee

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Brief of Appellee

In view of the fact that the principal contention of the appellant is that the Trial Court erred in denying its motion for a directed verdict, we believe that this Court will be materially assisted by a statement of facts based upon the evidence, with citation to transcript pages, and, therefore, beg leave to make such statement, although in doing so there may be some repetition of facts interspersed throughout appellant's argument.

And with reference to the facts that are set forth in appellant's brief, we believe it only fair to point out that no attempt has been made by appellant to set out the full con-

text of the evidence or meaning of any witness, but has seized upon different sentences appearing in the evidence, omitting other sentences, and combined those selected, in such a way as to give plausability to its argument. We make no complaint of this method of presentation, and mention it here only in order that the Appellate Court will understand that we do not agree with the fact conclusions set forth in appellant's brief.

STATEMENT OF FACTS.

The evidence shows that the appellee enlisted on July 28, 1917 and was discharged on December 22, 1918; that his life prior to enlistment was that so common to many young Americans—some attendance at high school, a short course in bookkeeping and typewriting, coupled with employment as a steel worker, boiler maker, harvest field hand and with some restaurant work, and that he was a healthy person. (Tr. p. 13-14.)

He arrived in Europe in December, 1917, at which time he was granted War Risk Insurance in the sum of $10,000 (Tr. pp. 14 to 16).

His duty took him to the front lines in January, 1918, and he was almost continuously on the front, with periods in rest area, until the date of his wound on May 10, 1918. (Tr. p. 17.)

On the evening of May 10, 1918, he was detailed as a guide, taking men in and out of the trenches, and while advancing toward the trenches, he was hit by high explosive. Although feeling the burn when hit, but not realizing he was wounded, he endeavored to push on, placed his hand inside his shirt and feeling blood, he reported to

Sergeant Rogers, and was sent back in care of Higgins and before reaching the regimental infirmary he had become so weak that Higgins was almost carrying him. (Tr. p. 17-18.)

This marked the commencement of his experience in the army hospitals, which continued until the time of his discharge. (Tr. p. 18.)

He was evacuated with other wounded, receiving serum to prevent blood poisoning, lost track of time and place, and finally reached a French base hospital, where he received his first operation. (Tr. p. 18-19.)

From there he was taken to Military Red Cross Hospital No. 1, Paris, where he stayed about ten days, and from there to Base No. 34, Nantes, France, where he was operated on under ether about six times, and had many operations and probings under local anaesthetic. His wound developed a pus condition, and incisions were made in his back and under his arm for probing and for treatment with Dakins solution. His experiences in the hospital are related by him in simple but graphic language, which depicts a time of anguish and pain—repeated dressings with attendant pain, probing for the shrapnel, continued fever, with a wasting away of his body, until he was down to skin and bones, frequent hemorrhages that called for more probing with instruments to reach the ruptured arteries and veins, coughing spells, a bed in the ward termed "Death Ward," in which only serious cases were cared for, until finally he was so weakened that it was necessary to give him a blood transfusion, followed immediately by an operation, which resulted in extracting the shrapnel from his

body on August 10, three months after he was wounded in action. (Tr. p. 19-20; Tr. p. 64-65.) The shrapnel entered from the front and was taken out in the back. He had tubes for Dakins solution in two places in the back, one under the arm, and one in the wound in front. (Tr. p. 21.) He remained in hospital until a day or two before his discharge. (Tr. p. 22.)

The nature and severity of the wound and the attendant treatment are disclosed by the scars which he bears upon his body. The best description of these scars appears in the testimony of Dr. Louis W. Allard, at pages 122 and 123 of the transcript.

The service record of the appellee prepared at the time of his discharge (Tr. p. 23-27) indicates that the examining surgeon and the board of review recognized the serious nature of his wound, as the statement is contained therein that the wound was likely to result in death or disability, and at that time he was rated 30% disabled.

The appellee's after-war history falls into three natural divisions: before Vocational Training period, Vocational Training period, after Vocational Training period; and the latter period is distinguished by his experiences as an employee of the Ferndale cafe and as an employe of other establishments.

As before stated, he was discharged on Dec. 23, 1918, and went to his father's home, where he stayed until April or May, 1919, during which time he was rated as totally disabled for compensation purposes, and ever since he has received compensation with rating varying from 20% to total, at the time of the trial the rating being 66%, and he

has been in government hospitals at least four times since his discharge. (Tr. p. 28.)

In April or May, 1919, he tried to work at the Wide Awake cafe at Ft. Smith, Ark., as a waiter, but not with full duty as he was not permitted to do table work, due to the fact that he could not carry the loads, and not feeling good, he left this job, after notifying the Veteran's Bureau. (Tr. p. 28-29.) A significant feature in connection with this employment is Exhibit C (Tr. p. 44) introduced by the appellant, an employment statement of the appellee, in which the statement is made that he will stop work at the Wide Awake cafe about the first of the month for lighter work, as the work he was doing was too heavy, this statement being made at a time when appellee could not have been thinking of insurance payments.

We next find him employed at the Albin cafe in Cheyenne for five days during a rodeo, and at a time when there was need of extra help. (Tr. p. 29.)

Before enlisting he had been employed at Miles City by Jim Peterson, and he was again employed there after his discharge, where he continued to work for six weeks to two months, but his work was not satisfactory as was demonstrated by the fact that Jim Peterson sold the cafe, and although all the help was retained, the respondent was discharged within two or three days by the new proprietor. (Tr. p. 29.)

The Ingham cafe at Miles City needing some one on the job during the afternoon, when work was very light, the appellee was given the position and remained there for a month or six weeks, when he entered Vocational Training.

(Tr. p. 30.)

Vocational Training was not satisfactory to the government or the appellee. (Tr. p. 30-34.) He was placed at the Bozeman State college in bookkeeping, typewriting and accounting (it will be remembered he had some study in these subjects before the war); in a short time he was taken off typewriting and continued with bookkeeping, but he was unable to make any progress, although he had considered himself a good student before the war. His training was soon changed by the Vocational Board to baking, first being sent to the Purity Bread company at Billings, where his duty consisted mostly of observation, and from there to the Dunwoody school at Minneapolis. At this school he was unable to do any of the chemical work, and his work consisted mostly of experiments with small quantities of material, the laboratory work not being done with any results. He has never received a certificate from the school, as he was unable to get the actual baking experience necessary. After leaving the school, the board placed him with the Nichols bakery at Billings, and immediately his physical incapacities were manifested. The bench work was too heavy; after doing a day's work, he found it necessary to go to his hotel room where he would throw himself upon his bed and lay there until the next morning, frequently with nothing to eat and without undressing. The Bureau again changed his objective to restaurant work, and he was placed first at the Metropolitan cafe and later at the Main cafe, where he completed his Vocational Training. He tried to work during his training at the Main cafe, but was not successful and he was not permitted to do anything

and finished his training in observation work.

After finishing his Vocational Training, his history is that of steady employment at the Ferndale cafe in Billings on two different occasions for quite long periods of time, with many attempts to work and many discharges when not employed at the Ferndale.

Thus his first employment was as a cook at Shelling's cafe for about two months in Dec. 1922 and January 1923. He was unable to perform his duties, could not do any lifting, could not stand the heat of the range, had fainting spells and was aided by the proprietor and other employees and was finally discharged. (Tr. p. 34-35.) He is corroborated by Mr. Shelling, the proprietor (Tr. p. 67-68) and Mrs. Velma Dugan (Tr. p. 77-78) one of the employees, who at times did part of his work.

We next find him at the Metropolitan or Luzon cafe in August and September, 1923, during the rush fair period (Tr. p. 35), not having been able to do any work from January to August.

A period of idleness followed until January, 1924, when he secured employment at the Ferndale cafe, and continued in that employment for about two years and eight months.

J. H. Daniels, secretary of the Cooks and Waiters union, testified (Tr. p. 79-80) that the Ferndale cafe is a small cafe, that the work is considered a small job, and that the witness would not recommend the appellee for work at a larger place, and with this condition in mind it is interesting to note appellee's work at the Ferndale.

Thus hard work had to be done by some other employe, who ever happened to be on shift with appellee did this

kind of work. (Tr. p. 35.) Appellee had duties requiring heavy lifting. It was done by calling some other employee who could do it, or by leaving it to the next shift. Appellee was troubled with faintness, drawing under the heart, by a catch in the neck, which made him sick; these spells incapacitated him from work, and he would have to sit down or lay across a table or bed, the spells lasting from five minutes to half an hour, and during these spells the work would pile up or be done by some other employee, and he was finally discharged. (Tr. p 36-37.) Frank Buckley (Tr. p. 74-76), Mrs. Velma Dugan (Tr. p. 77-78), and Mrs. Flora Summers (Tr. p. 78-79), who were employed with appellee at the Ferndale, all corroborate his testimony in this respect, and testified that they helped him in the performance of his tasks, Buckley explaining (Tr. p. 75), "I did it because Carl needed the work, he was a good fellow and he had a family and he needed to do it to keep his family going."

After his discharge from the Ferndale, he was employed at the Metropolitan for a short time through the fair with the same experiences as at the Ferndale. (Tr. p. 37.)

He then went to the New Bungalow in September or October, 1926, where special arrangements were made, like building high tables, to assist appellee. His experiences there were similar to the Ferndale. Frank Larson, manager, (Tr. p. 70), corroborates appellee, and states that he did not have any endurance, and while a good man when starting the shift around 6 or 7 in the morning, by 7 or 8 he got tired and it would seem he would die on the shift, and after trying him for about six weeks, he had to turn

him loose.

Appellee was then idle until May 17, 1927, when he secured employment at the Northern hotel (Tr. p. 37), where he had fainting spells, the work was too heavy, he could not stand the heat from the boiler, and he had to go to the hospital at Helena. T. C. Peterson, chef, (Tr. p. 71-73), corroborates appellee, and states he had dizzy or fainting spells, that he had to be helped outside five or six times, and it would be about two hours before he got back on the job, that appellee was useless in lifting heavy articles, and that when appellee returned from the hospital he would not take him back.

Appellee returned to the Ferndale in July, 1927, (Tr. p. 38) and had the same experience as at the time of his first employment there, staying there until April, 1931, when he quit, "because I had gotten in such shape that I couldn't get along with any one—was in a nervous condition. I dreaded to go to work, and when I would leave, I would go home and go to bed, and maybe never leave the house until it was time to go to work the next morning, and maybe something would upset me, and I would go all to pieces, and so I just quit. I knew Mr. Loomis was dissatisfied with my work." James Buckley (Tr. p. 74-76) and Mrs. Flora Summers (Tr. p. 78-79) also worked with appellee at the Ferndale during this period and corroborate his testimony.

After leaving the Ferndale, he was employed at Carlin's cafe for a month and a half, being discharged on account of inability to do the work, was at Byron's cafe for six days and was discharged on account of inability to do the work (Tr. p. 38); worked at the Big Timber cafe

during a rush season, being helped all the time by the proprietor (Tr. p. 39); ran a lunch counter at the sugar factory, employing all help (Tr. p. 39); was employed at Casey's at Laurel during a tournament, being helped by Mr. Casey (Tr. p. 39), and at the time of the trial was at the Billings Golf and Country club, not doing any work, but hiring all work done. (Tr. p. 39.)

To briefly summarize his evidence, as corroborated by others, it shows a history of inability to hold a position before his entry into Vocational Training, repeated changes of objective by the Vocational Board during his training period, and casual employment and repeated discharge after Vocational Training, except at the Ferndale cafe, where he was enabled to handle his job only by reason of the good natured help of his fellow employees, and at that place he was discharged once and forced to quit the second time on account of his physicial and nervous condition.

Before referring to appellee's testimony relative to his physical and nervous condition during these years, it is well to direct the court's attention to the testimony of Edward M. Shelling (Tr. p. 69), Frank Larson (Tr. p. 71), T. C. Peterson (Tr. p. 72) and James Buckley (Tr. p. 76), all experienced restaurant men, who testified that the appellee was unable to handle the job without assistance from others, and it is also pertinent at this time to point out that his experience in Vocational Training demonstrated that he was not fit for sedentary jobs; in short, he was not fit for either active or inactive employment.

Appellee testified that since his discharge his condition has been bad—nervousness, aching in the left arm and mus-

cles down into the palm of the hand, catches in the wound, spells that do not render him unconscious, but which compel him to lie down and render him weak and nervous and cause him to sweat, catches in the neck, the attack being accompanied by dizziness and drawing pains in the heart, which leave him sick and weak; that these attacks have been continuous since his discharge (Tr. p. 39-40); forgetfulness, which has hindered him in his restaurant work (Tr. p. 41); that his life has consisted largely of work and going home to bed, with little social recreation (Tr. p. 41); that his condition has been getting worse since his discharge (Tr. p. 41); that he has consulted with doctors almost continuously and been advised not to work, but that he has been unable to stop work, as he has a family to support, and his income has never been sufficient to support his family without work. (Tr. p. 41-42.)

Mrs. Francis, wife of the appellee (Tr. p. 65-67), corroborates him as to need of rest after a day's work, little social recreation, suffering, and the fact that the necessity of supporting the family has spurred him on to work.

Appellant's counsel, by cross examination of appellee, endeavored to show large earnings by appellee from the date of his discharge, and directed questions to appellee (Tr. p. 62) indicating that counsel's computation showed that in twelve years' time the appellee had lost twenty-five months, out of which time he had spent possibly six months in bed, to which question the appellee answered that was possibly correct, but that he could not say positively, as he had not given any thought to the matter; counsel thereupon propounded a further question based upon counsel's com-

putation that appellee had worked ten years, or one month less than ten years, said work including the time in Vocational Training, and that counsel's computation showed earnings between $15,000 and $16,000, including vocational training pay, to which appellee answered yes.

It is readily apparent from the transcript, however, that appellee's answers, fairly construed, meant that if the computation of appellant's counsel was correct, that he agreed with said computation.

However, a check of the record in this case shows a much different situation.

The record of work is to be found in appellee's testimony (Tr. p. 28-38) and in appellant's exhibit F (Tr. p. 49-54), this exhibit being an Industrial History Affidavit, which had been executed by the appellee at some time prior to the trial. It is to be noted that there is no marked difference between appellee's testimony and this affidavit.

Taking the period from Dec. 23, 1918 to April 1, 1931, when appellee last left the employe of the Ferndale cafe, the approximate number of weeks amounts to 637.

Reducing the work period to terms of weeks it shows approximately as follows:

Wide Awake cafe, Fort Smith, 6 weeks;
Albin cafe, Cheyenne, 5 days;
Jim Peterson, Miles City, 6 weeks;
Ingham cafe, Miles City, 10 weeks;
Shelling's cafe, Billings, 8 weeks;
Luzon cafe, Billings, 8 weeks;
Ferndale cafe, Billings, 131 weeks;
Metropolitan cafe, Billings, 10 days;

New Bungalow cafe, Billings, 5 weeks;

Northern hotel, Billings, 9 weeks;

Ferndale cafe, Billings, 191 weeks.

A total of 374 weeks, 15 days, approximately 376 weeks.

So that the record shows that out of approximately 637 weeks to April 1, 1931, appellee was idle approximately 130 weeks, in training approximately 131 weeks, and working approximately 376 weeks.

But it is to be remembered that he was only able to do this work by reason of the aid given him by other employes, and in addition appellant's counsel developed on this cross examination (Tr. p. 60-61) that quite often appellee was forced to employ some person to finish out his shift and to pay for this work out of his own funds, which appellee estimated amounted to as much as a month out of the year.

And taking the period from April 1, 1931 to the date of trial, as shown by the appellee's testimony (Tr. p. 38-39), a period of approximately 61 weeks, appellee was able to work six weeks at Carlin cafe, six days at Byron's cafe, several weeks at Big Timber cafe, ran a lunch counter at the sugar factory, having all work done, had a few days' employment at Casey's at Laurel during a tournament, and was at the Golf club at the time of trial, hiring all work done, in short not able to hold gainful employment much more than 10 weeks out of 61 weeks.

Appellee introduced the testimony of three doctors—Dr. Ferris Arnold (Tr. p. 81-85), Dr. Robt. J. Hanley (Tr. p. 85-89), and Dr. John L. Treacy (Tr. p. 90-98), the first two having attended appellee and the last named being called to testify as to his conclusions based upon all the evidence in

the case.

Appellee consulted with Dr. Arnold during the period from 1921 to 1926, and the witness gave a diagnosis of chronic myocarditis, enlargement of heart, chronic nephritis, chronic respiratory infection, neurosis and extreme mental despondency, shortness of breath, pulse 120, 140 on exertion, low specific gravity urine, rales in chest, casts and albumen in urin, chronic cough, temperature from 100 to 103, weakness and inability to do his work, (Tr. p. 82.); gave it as his opinion that the condition was due to the wound received in action, that in his opinion appellee was permanently and totally disabled in accordance with the Treasury Department definition (Tr. p. 83), that such permanent and total disability dated back to the date of the wound and would continue throughout the life time of the appellee (Tr. p. 83-84), and that in his opinion the appellee was not in fit condition to work, and the work he did had a tendency to further impair his health.

Dr. Hanley, who treated appellee from 1926 to date of trial, corroborates Dr. Arnold in all material particulars, and he refers to the fact that at the time of the trial, appellee looked better than at any time he was observing him, ascribing his then condition to the fact that he had not been engaged in any hard work for some time. (Tr. p. 86.)

Dr. Treacy, who is consulting surgeon for the Veterans' Bureau, heard all of the evidence in the case, gave a diagnosis similar to that of Dr. Arnold and Dr. Hanley, gave it as his opinion the appellee was totally and permanently disabled in accordance with the Treasury Department definition; that the disability resulted from and dated back to

the time of the wound and would continue for the life time of appellee, testified his condition was such as could be produced by the injury received in action, and that the pus condition of his lung after the injury was capable of causing the heart condition and the kidney condition, and that the only treatment for the condition was and is complete rest, and that the work he had done had a tendency to further impair his health (Tr. p. 90-98); on cross examination (Tr. p. 95) the witness refers to Dr. Hanley's testimony that the appellee was in better shape at the time of the trial than usual because of the fact that he had not been engaged in hard work for some time.

The appellant's case consisted largely of evidence of physicians, who had made one or more examinations of the appellee.

Dr. Wm. H. Fortin (Tr. p. 99-107) testified to one examination on March 3, 1926, and his diagnosis of the condition being chronic fibrous pleurisy and fibrosis of left upper lobe, states that no heart condition was found, that the heart beat was regular, no murmurs, blood pressure 112-78, and that there was no urinalysis of record, so he could not testify to the kidney condition (Tr. p. 99-100); states that the only condition that would handicap appellee from following his occupation as cook or waiter was the injury or the scar tissue which formed at the side of the injury (Tr. p. 103); on cross examination (Tr. p. 106), stated he would require several examinations to get a picture of the pulse rate, that he had only examined appellee once, that the pulse is not recorded, if anything abnormal it would have been recorded, that the blood pressure was not abnormally

low, although he admits (Tr. p. 107), that at the age of 32, that being appellee's age at the time of the examination, the normal rate would be 120-80 or it might be up to 125 or 130, his testimony on direct being that the pressure in this instance was 112-78.

Dr. James I. Wernham (Tr. p. 107-111), testified to appellee's complaint to him, described the conditions found, states the pulse rate was 88 sitting, 112 standing, blood pressure 120-78, that the outer edge of the heart extended further to the left than normal, which would be either due to enlargement of the heart itself or due to scar tissue drawing it over; that the fact of the difference in pulse rate in sitting down and standing showed weakness of the heart; that his condition would probably handicap him from some of his duties, that his strength was impaired; and on cross examination testified that the heart was not normal, that he found a myocardic insufficiency, which should be treated by not over exertion, the only treatment being rest, and that while he found no albumin in the urine, it was not conclusive that it was not present, as it would appear some times and not other times.

Dr. Marcus H. Watters (Tr. p. 114-119), physician for the Veterans' Bureau, described an examination on June 28, 1927; states that an examination and diagnosis was made by a specialist in nervous and mental diseases due to appellee having neuritis of the left ulnar and median nerves (Tr. p. 115), (the government did not produce the specialist who made this diagnosis). The witness further stated that the physical examination and X-ray showed a fibrosis in the upper lung, and a diagnosis of pleurisy, (the govern-

ment failed to produce the X-ray). Witness further stated the appellee was in hospital from May 27, 1927 to July 10, 1927 (Tr. p. 115), that there was no disability of the heart, although he testified that the pulse rate on admission was 90, on the second day it was recorded as 100, in the afternoon of the same day 80, and with the exception of a few slight declines in the pulse rate for the next week, it did not reach higher than 90, and the average pulse rate was 85 (Tr. p. 116); (Dr. Fortin had testified (Tr. p. 105) that the normal pulse rate is 70 to 80); that the neuritis or inflammation of the left ulnar and median nerves would prevent appellee from following the occupation of cook or waiter, and also the atrophy of the shoulder muscles and consequent atrophy of the muscles of the left arm (Tr. p. 116-117); and then on suggestion from government counsel, changed his statement and said it would not prevent but would handicap appellee, then explained it would all depend upon what the man was doing. On cross examination, he said that with the assistance of others in performing parts of his duty, appellee could follow the occupation of cook; that his heart condition might have developed under the strain of work, and that the pus condition at the time of the injury could possibly produce a heart condition that might eventually develop into heart trouble.

Dr. J. H. Bridenbaugh (Tr. p. 111-113 and Tr. p. 119-120), testified to taking of X-ray pictures, that the X-rays showed no trace of injury to the lung; that if it was a penetrating wound, the resulting disability **might be evidenced** by the X-ray (Tr. p. 112), and that the X-ray **would not necessarily** show any myocardiac insufficiency. (Tr. p.

120.) (Emphasis is ours.)

Dr. Louis W. Allard (Tr. p. 121-125) testified to an examination on January 15, 1924, described the nature of the scars on the body of appellee (Tr. p. 122-123), states that if shrapnel penetrated the chest wall, there would have been something in his notes (Tr. p. 123), but on cross examination (Tr. p. 124-125), after his attention was directed to the fact that the shrapnel entered from the front, was extracted from the rear, and that the scar under appellee's arm was due to an incision for probing purposes, stated that a missile usually takes the straightest line, and that it would have to go through the chest wall, but that it was possible it could have followed the tissue plane; that the fact of empyema or pus condition at the time of the wound suggested a penetrating wound, and the fact that appellee spat blood immediately after the injury also suggested a penetrating wound.

Appellant also introduced the evidence of three lay witnesses: A. M. Loomis (Tr. p. 126), proprietor of Ferndale cafe; Mrs. A. M. Loomis (Tr. p. 128), wife of proprietor, and Charles E. Richstein (Tr. p. 130), foreman of Purity Bread Co.

The testimony of Mr. and Mrs. Loomis shows that the kitchen work was performed satisfactorily, Mr. Loomis (Tr. p. 128) stating his duties were mostly in the front of the building, and Mrs. Loomis (Tr. p. 129) stating that she knew others helped appellee lift stock pots, that appellee complained of feeling unwell, that he always spoke of being tired and not feeling well, that he was dependable and she could depend on him being on the job, and the work was

gotten out, and that was all she was concerned with, that if it hadn't been for the fact that the work was gotten out at all times, she would not have been able to keep him there, and if other employees helped him to do portions of his work, there was no objection on her part.

From the analysis of this evidence, it is apparent that Mr. Loomis' duties were mostly in the front, greeting customers, while Mrs. Loomis supervised the details of the work, including the kitchen work, and she indicates in her evidence that the testimony given by the appellee and other employes in the kitchen was a correct recital of the facts.

And the evidence of Mr. Loomis suggests that there may have been some resentment on his part toward appellee by reason of the fact that appellee suddenly quit his employ, his explanation (Tr. p. 128) being:

> "Then he worked for me up to the spring of 1931, at which time he just quit. I think he did not give me any reason for quitting. He said he believed he would quit. I said, 'All right.' "

In short, it seems strange that a trusted and valued employee would be permitted to quit without explanation or any attempt whatever to get him to reconsider his decision —the very circumstances would suggest that everything was not as agreeable as Mr. Loomis pictures in his testimony, and that there may have been some feeling of relief that the appellee had quit. However, the jury are the judges of the credibility of witnesses and the weight to be given to testimony, and the standing of a witness in the community, his demeanor on the witness stand and manner of testifying may be such that the jury are justified in

placing little credence on his testimony, and there is nothing in the record to show that the jury was not justified in disregarding the evidence of Mr. Loomis.

The testimony of Mr. Richstein (Tr. p. 130) has little probative value. The appellee was there in vocational training, and the witness paid little attention to him, did not know that the government placed him there for training, did not know whether he had any duties around the shop as a vocational training student, was not his immediate supervisor, and could not tell how much work the appellee did in a day.

ARGUMENT.

The contention of appellant is that the trial court erred in denying motion for directed verdict made at the close of appellee's case and again of appellant's case, said motion being based on the ground that there was no substantial evidence in the record that the plaintiff became totally and permanently disabled on the date mentioned in the complaint or at any time. (Tr. p. 98 and Tr. p. 131.)

The rule in this Circuit, as well as in all Circuits, is that the court may not weigh the evidence, that if there is substantial evidence bearing upon the issue, to which the jury might properly give credit, the court is not authorized to instruct the jury to find a verdict in opposition thereto.

The rule is aptly stated in United States v. Burke, 50 Fed. (2d) 653, 656, a case involving War Risk Insurance appealed to this court from Washington, as follows:

> "Under the settled doctrine as applied by all federal appellate courts, when the refusal to direct a verdict is brought under review on writ of error, the question

thus presented is whether or not there was any evidence to sustain the verdict, and whether or not the evidence to support a directed verdict as requested, was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party.

"And on a motion for a directed verdict the court may not weight the evidence, and if there is substantial evidence both for the plaintiff and the defendant, it is for the jury to determine what facts are established even if their verdict be against the decided preponderance of the evidence. (Citing cases.)

"The right to a jury trial is guaranteed by the Constitution, and it is not to be denied, except in a clear case. The foregoing decisions, and many others that might be cited, have definitely and distinctly established the rule that if there is any substantial evidence bearing upon the issue, to which the jury might properly give credit, the court is not authorized to instruct the jury to find a verdict in opposition thereto. (Citing cases.)

"Again, such an instruction would be proper only where, admitting the truth of the evidence for the plaintiff below, as a matter of law, said plaintiff could not have a verdict." (Citing cases.)

The question of total disability is a relative one and depends upon the particular facts in each case. To quote from United States vs. Rasar, 45 F. (2d) 545, 547, an appeal to this court from Washington:

"Total disability is not an abstract concept. It is not the same in all circumstances and under all conditions. It is a relative term, and whether it is present

in a particular case depends upon the peculiar facts and circumstances of that case. The problem of determining whether it exists in a given case is concrete and relative—not abstract."

This court has considered many cases similar to the present one, and the rule to be applied herein has been definitely determined.

Thus, in United States v. Sligh, 31 F. (2d) 735, appealed to this court from Arizona, and one of the first cases to come before this court, the opinion contains the following apt quotation:

> "The term 'total and permanent disability' obviously does not mean that there must be proof of absolute incapacity to do any work at all. It is enough if there is such impairment of capacity as to render it impossible for disabled person to follow continuously any substantially gainful occupation.
>
> "Facts that during major part of period appellee was receiving a substantial salary is material, but not conclusive. Aside from consideration that testimony tended to show that employer was moved by sentiment and sympathy, fairly construed, the policy is to be understood as meaning not present ability in an absolute sense, but a capacity that may be legitimately exercised; that is without serious peril to the life or health of insured. * * * had appellee put aside concern for the immediate necessities of his family and yielding to advice of conservative physicians, wholly refrained from work, it may be doubted whether any question would have been raised of his right to receive insurance."

And in this case, if Francis had heeded the advice not

to work given by his physicians as early as 1921 (Tr. p. 84), there can be little question as to a determination of total disability, but Francis, just the same as Sligh, was faced with the necessity of supporting a family, without thought to the effect of work upon himself.

The case of United States vs. Meserve, 44 Fed. (2d) 549, appealed to this court from Oregon, is one wherein the appellee worked as a brakeman for twenty-six months, making $5,275.00, during which period he did considerable over-time work, but the evidence showed that everything possible was done by his wife and fellow railroad laborers to make it possible for him to earn a living, being assigned to the easiest run available, given the lightest task on his train, with his fellow workers performing a large portion of his tasks. The following pertinent quotations are taken from the opinion of the court:

> "Total disability is any disability of mind or body which renders it impossible for a disabled person to follow continuously any substantially gainful occupation, and such disability is deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. The principal insistence of the appellant is that the unchallenged work record of the insured after his discharge from the service shows conclusively that Meserve was not permanently and totally disabled until long after the expiration of his insurance. * * * From the record before us, however, it will not do to consider this proof abstractly, but there must be taken into consideration additional facts and circumstances which we

> believe shed material light upon the actual condition of the insured. The question is not what the railroad company's pay roll shows; it is what was the physical condition of the insured at the time. The record facts have no mysterious convincing force which foreclose their being explained and ameliorated by the proof of attendant and surrounding circumstances and conditions.''

It is to be noted that the present case in many respects is similar to the Meserve case—thus the only place where appellee was able to hold any protracted employment was at the Ferndale cafe, which, according to the testimony of Mr. Daniels, secretary of the Cooks & Waiters union, was one of the smaller cafes in town, and even for appellee to hold employment there it was necessary for fellow employes to do a large part of his work, even at times taking over the work in its entirety because of the fact that appellee was laid out by fainting and dizzy spells.

United States vs. Lawson, 50 F. (2d) 646, was appealed to this court from Idaho. The appellee was sick in France and confined in hospital; at the time of his discharge no rating of disability was made, but after reaching his home he was in poor physical condition. He was given employment with the Forest Service, experienced great difficulty in doing his work in telephone maintenance and in doing the necessary horse back riding; he was transferred to clerical work with the Forest Service, but was discharged on account of his inability to lift implements around the office. He then secured appointment as a postmaster, but was compelled to hire some of the work done around the post office.

During all this period, he was in receipt of fairly good wages. The government contended, as it contends in the present case, that the evidence was not sufficient to show total and permanent disability while the policy was in force. This court, in its opinion, showed the falsity of the government's contention. To quote from the opinion, commencing on page 651:

> "It might be argued that the fact that plaintiff managed to hold several positions for the greater part of the time during the years in question, and actually engaged in work, proves that he was able to work and not totally and permanently disabled. But this does not necessarily follow. It is a matter of common knowledge that many men work in the stress of circumstances when they should not work at all. When they do that they should not be penalized, rather should they be encouraged. A careful examination and consideration of the evidence herein convinces us that the plaintiff worked when he was physically unable to do so, and that but for the gratuitous assistance of friends and relatives who did much of his heavy work and the assistance of those whom plaintiff employed at his own expense, he would have been unable to retain his several positions. Under such circumstances, he should not be made to suffer for carrying on when others less disabled than he would have surrendered."

The court then quotes with approval from United States v. Godfrey, 47 F. (2d) 126, 127, a Massachusetts case, as follows:

> "If such claimants are able to follow gainful occupations only spasmodically, with frequent interrup-

tions due to disability, they are entitled to recover under the act.

"The evidence not only showed that Godfrey did follow 'only spasmodically' his 'gainful occupation,' but that he was 'able' to do less than he actually did —that he went to his place of employment when (as the jury may well have found) he was not 'able' so to do.

"The evidence is persuasive that Godfrey was a war victim. He was entitled to the most favorable view of the evidence. (Citing cases.) To hold him remediless because he tried, manfully, to earn a living for his family and himself, instead of yielding to justifiable invalidism, would not, in our view, accord with the treatment congress intended to bestow on our war victims." (Citing cases.)

The court further quotes with approval from Carter v. United States, 49 F. (2d) 221, 223, a North Carolina case, as follows:

"The mere fact that a claimant may have worked for substantial periods during the time when he claims to have been permanently and totally disabled is not conclusive against him. The question is not whether he worked, but whether he was able to work, i. e., whether he was able to follow continuously some substantially gainful occupation without material injury to his health. Of course, the fact that a man does work is evidence to be considered by the jury as tending to negative the claim of disability; but the fact that he works when physically unable to do so ought not to defeat his right to recover if the jury finds that such disability in fact existed"

The court also quotes with approval from United States v. Phillips, 44 F. (2d) 689, 691, a Missouri case, as follows:

> "The government contends that the evidence of his working is so overwhelming that the court should have given a peremptory instruction to the jury. If the mere fact that the insured did work is conclusive evidence that he was not permanently and continuously disabled, then there should have been no recovery on this policy. The term 'total and permanent disability' does not mean that the party must be unable to do anything whatever; must either lie abed or sit in a chair and be cared for by others, (citing a quotation from United States v. Sligh, heretofore cited in this brief). Some persons, who are totally incapacitated for work, by virtue of strong will power may continue to work until they drop dead from exhaustion, while others with lesser will power will sit still and do nothing. Some who have placed upon them the burdens of caring for aged parents or indigent relatives, feeling deeply their responsibility and actuated by affection for those whom they desire to assist, will keep on working when they are totally unfit to do so."

We have taken the liberty of quoting freely from this decision, as it indicates that this court is not alone in the principles applied to this class of cases.

The present case is similar in many respects to the Lawson case—(Lawson was sick in service) appellee was wounded in action, he was rated as disabled at time of discharge, which did not apply to Lawson, he was in bad physical condition upon his discharge, was discharged from some positions, could only hold the position at the Ferndale by reason of the fact that others assisted in doing por-

tions of the work, and in addition was compelled to pay other employees to do some of his work at the Ferndale, at times when his condition would no longer permit his continuing on the job.

In the recent case of Sorvick vs. United States, 52 F. (2d) 406, appealed to this court from Idaho, the trial court directed a verdict in favor of the government, the trial court seemingly influenced by the insufficiency of the testimony of the two physicians who testified for the appellant. This court, in its opinion, refers to the fact that, in addition to the testimony of the physicians, considerable evidence was presented by lay witnesses, including the appellant, showing difficulty in doing any work, and the court holds that quite aside from the conflicting medical testimony, the plaintiff's own testimony on the stand would tend to establish that he was totally and permanently disabled.

In the instant case there is no conflict in the medical testimony—all doctors agree that Francis was disabled, the only point of difference being the extent of the disability, and in addition the testimony of the appellee and other lay witnesses show conclusively his inability to continuously follow any gainful occupation.

Numerous other cases could be cited, but we believe that these already cited are sufficient to demonstrate that the facts in this case justified submission to the jury, and, therefore, we will not burden the court with other citations.

At this time, we take the opportunity to examine the cases cited by the appellant in its brief on this division of the case.

The case of United States v. Griswold, 61 F. (2d) 583,

was appealed to this court from Oregon, it being one of the most recent decided by this court. The evidence showed that the appellee worked for long periods of time, but was only able to do so with extreme difficulty, and the court holds that the matter was properly submitted to the jury, the following quotation forming the last paragraph of the decision:

> "At the argument we were impressed that the case was controlled by the above cited cases, but a study of the briefs and record convinces us that there was substantial evidence to go to the jury upon the proposition that although plaintiff actually worked for long periods of time, he was not then able to do so nor to do so continuously, and that the case is ruled by our decision in U. S. v. Sligh, 31 F. (2d) 735; U. S. v. Meserve, 44 F. (2d) 549; U. S. v. Rasar, 45 F. (2d) 545."

United States vs. Kerr, 61 F. (2d) 800, appealed to this court from Oregon, presents an entirely different state of facts from the instant case. Kerr claimed injury from which he never recovered, that the injury caused stiffness of the knee, testified to many places of employment, both in vocational training and after that training, that he was employed as a watchman, the evidence showing he was able to do the work required without assistance, his evidence being that he could not walk without limping. The present case is entirely different—Francis was injured by shrapnel being driven through his body, this was followed by months of hospital treatment, with a pus condition of the lungs, and a history of casual employment and repeated discharges after his service, except on the one job where

other employees assisted him in his work; not only that, but the vocational training board found it necessary to change his objective twice while he was in training. In addition, the medical testimony in the Kerr case was inconclusive, the only doctor testifying having met Kerr approximately ten years after his injury, had made statements before the trial contradictory to the statements he made at the trial, and his testimony, to show that the alleged disability dated back to the date of injury, being based on a hypothetical question, which the court points out was not predicated upon the evidence in the case and assumed conditions not shown by the evidence—in the present case, two doctors, who had Francis under observation from 1921 to the date of the trial, testified, and in addition Dr. Treacy, consulting surgeon for the bureau, who had heard all the evidence in the case, testified, basing his statements upon all of the evidence, and the doctors for the appellant all joined in testifying that Francis was disabled, the only point of difference being the degree thereof. The court in its opinion was speaking only of the peculiar facts shown by Mr. Kerr and his witnesses. To quote:

> "The subsequent employment for the periods covered, in the absence of evidence of **inability** to work—not merely unemployment, and the nature of the injury complained of, refutes the idea that appellee was totally and permanently disabled at the date of discharge. (Citing cases.) And emphasis is further given to this fact by the doctor as to his ailments **at the time of the examination more than eleven years after the discharge when the disclosed condition was**

present, attributing the ailment to **sciatica.**

The court then points out that there is no evidence showing any infection of this knee at any time since injury, nor testimony of any condition believed to be neurosis, nor is there evidence that the injury to the knee cap caused injury to the sciatic nerve and caused the condition which the doctor testified he described in the letters to the hospital. In short, the case turns upon the question of the lack of showing of material matters by the evidence, a condition not present in the instant case.

United States vs. Thomas, 53 F. (2d) 192, a case in the Fourth Circuit, appealed from South Carolina, shows that, as a result of a wound received in action, there was a disability of the left fore arm, that some of the bones of the wrist and the third finger of the right hand had been removed, and that the lower teeth of the right lower jaw were gone and the bone somewhat distorted. Thomas' family physician in testifying said the chief disability was the atrophic condition of the left arm, which greatly handicapped its use, and that in his opinion Thomas could not continuously do any kind of manual labor, requiring the use of the left arm, but said, however, that he was not totally disabled from following other occupations or lines of work, and the doctors for the government were agreed that many kinds of work of a substantially gainful character, such as telephone operator, salesman, manager of filling stations, etc., were open to him. In the instant case, it will be remembered that Francis was not able to do clerical work during his vocational training, was taken off study by the Vocational board, was placed in training as a

baker, where he was unable to do the laboratory work; in short, although he has tried to do both sedentary and laboring work, he has not been successful in continuously doing so, and the evidence is silent of any statement by any doctor of any type of work which he could continuously follow. It is interesting to note that Judge Northcott dissents from the majority opinion in the Thomas case and states that in his opinion there was ample evidence to take the case to the jury.

In United States v. Harth, 61 F. (2d) 541, appealed to the Eighth Circuit from Iowa, the evidence showed that shortly after his discharge from the army, insured worked for seven months at heavy manual labor with a plumbing supply concern, that this work caused his right leg to tire and pain him, compelling him to frequently take time off, which resulted in discharge; he then went with another plumbing supply house, where he did checking and manual labor, being employed with this concern from February, 1920, to April 1, 1926, and the treasurer of the company testified his services were satisfactory. There was no evidence on behalf of Harth that his employment was frequently of a casual nature, during rodeos, fairs and tournaments, that he was discharged from several places by reason of his inability to do the work, that the only place where he held employment, other employees jumped in and did a goodly portion of his work, and there was no evidence of disability to the heart, nerves and kidney, all of which matters appear in the instant case. Even with these matters not apparent in the testimony, the court says, page 543:

"There is in the testimony serious dispute as to

whether the injury of which appellee complains is permanent, or, at least, was permanent, in its earlier stages; but we believe that the evidence on this phase of the controversy was so far conflicting as to render the finding of the jury thereon final and conclusive. * * *

"It has been pointed out that, under certain conditions, the fact that a claimant may have worked for substantial periods during the time of claimed total disability is not necessarily conclusive against him. (Citing cases.) 'Continuously' means with reasonable continuity and regularity, as other men normally work." (Citing cases.) P. 544.

Can it be said that Francis worked as other men normally work, when the facts disclose that the only place where he could hold steady employment, the other employees performed many of his tasks.

The court then further points out that recently manifold attempts have been made to make subsequent condition of totality or permanency relate back to a period antedating the lapse of the insurance and to quote, p. 545:

"Appeal is made to the sympathy which is quick to respond to the suffering of the soldier, particularly when its cause is of service origin. This sympathy has been expressed in those cases in which work, substantially gainful, by the insured has been excused and overlooked, where it has been deemed seriously to imperil his life or health. Typical of these are cases of tuberculars, as pointed out by Judge Hutcheson in United States v. Martin, supra. to which may be added those involving afflictions of the heart. Marsh v. United States, supra. * * *"

The evidence on behalf of Francis in the present case shows a condition of the heart, lungs, kidneys and nerves; the evidence of the physicians shows that the pus condition in the wound at the time of the injury and shortly thereafter was sufficient to produce these conditions of the heart, lungs and kidneys, and that the nervous condition is a natural result of the wound and the suffering attendant thereon, and under the rule in the Harth case was a sufficient showing to justify the trial court in submitting the issue to the jury.

In United States v. Rice, 47 F. (2d) 749, appealed to this court from Oregon, the evidence showed manual labor performed by insured for a period of five years following his discharge from the army, but the opinion is silent as to any evidence such as we have in the present case of the nature of the employment, the help he received from other employees, evidence of doctors that the work done was detrimental to the health of the insured—in short there is no similarity between that case and the present case.

In United States v. Ely, 58 F. (2d) 217, appealed to the Eighth Circuit from Missouri, the decision of the court is based solely upon the evidence of the insured, his wife and insured's employer, that at the time of the trial and for eighteen months prior thereto, the insured had been steadily employed at normal wages, and had, in the words of his employer, "performed his work there with me satisfactorily," with absence of only about a week, caused by sickness.

Eggen v. United States, 58 F. (2d) 616, in the Eighth Circuit, discloses that the insured was free from disease or disability at the time of discharge; there was testimony

that when examined in September, 1919, he had symptoms indicating incipient pulmonary tuberculosis; that he was advised to go to hospital that he might be cured; and that he failed to do so. The court rested its opinion upon the lack of evidence to show that at the time the insurance lapsed for nonpayment of premiums, there was a condition of total and permanent disability, but the facts are dissimilar from the facts in the present case, as here was sufficient to show that the wound received by Francis was the cause of his trouble, and that it was reasonably of such a nature that it would continue throughout his lifetime. The court in the Eggen case points out that incipient pulmonary tuberculosis does not always result in total and permanent disability, and that it is curable in the early stages.

Appellant argues that the testimony of the physicians is divided into two classes; that is, testimony as to facts and as to opinion; that the X-ray is a great aid to physicians, and a physician, who can testify strictly to his opinion of what exists, makes that evidence practically conclusive when he can demonstrate the existence of the condition by an X-ray picture of the impairment. This argument merely goes to the credibility and weight to be given the evidence, and the argument should be directed to a jury rather than to an appellate court, but it is interesting to note that all the physicians, who were questioned relative to the matter, stated that a heart condition would not necessarily appear in an X-ray, and Dr. Bridenbaugh, who took the only X-ray introduced in evidence, stated that a lnng condition resulting from a projectile being driven through the lung would not necessarily show in the X-ray.

Appellant further directs attention to the testimony of Dr. Allard to the effect that the X-ray taken just before the trial showed no evidence of a penetrating wound of the lung tissue, and that the X-ray indicates that the left lung is better than the right lung, forgetting that its own witness, Dr. Watters (Tr. p. 115) testified that an X-ray taken at the government hospital showed a fibrosis, which means scar tissue, from the healing of some wound in the upper lung. The only conclusion that can be drawn is that X-rays, like doctors, differ, and that one X-ray, possibly by being of a superior type or stronger power, may show conditions that will not be developed by another machine; but, again, this only goes to the weight of the testimony, a matter for the jury.

Complaint is made that Dr. Arnold gave testimony for the appellee without having official records of the examination, and this is contrasted with the evidence of government doctors, who had written records. Again this argument should be directed to the jury, not the appellate court.

The testimony of Drs. Arnold, Hanley and Treacy is held up to ridicule, and the suggestion made that the records of the Adjutant General's office were available, and the fact that they were not used indicated an attempt to prove by speculation and conjecture that, which if it existed, was readily and easily proved by concrete, reliable evidence. This evidence to which government counsel refers, was all in the possession of the appellant and was not produced—the fact that it was not produced, if in existence, by the party who had possession of it, is highly suspicious and tends to raise the impression that these records undoubted-

ly had data that would be injurious to the government in its defense to the action. But, again, this matter goes to the weight of the evidence and is properly for the jury's decision.

Appellant further states that no evidence whatever was offered by the appellee of his inability to follow any other occupation than his prewar occupation of cook and waiter, conveniently overlooking the fact that the appellee's experiences in vocational training showed that he was not fitted for clerical work or laboratory work, and that after training he had fallen down on the job when he tried to do work requiring physical effort; in short, there was a showing that he was not fitted for either sedentary or active occupations. We do not know of any other way to prove this fact, except, possibly, by calling the roll of all known occupations.

It is respectfully submitted by the appellee that on this branch of the case, the evidence showing total and permanent disability was of a substantial nature, that the trial court was justified in submitting the matter to the jury, and that the verdict of the jury should not be disturbed by this Honorable Court.

———o———

The remaining assignments of error are directed to a question propounded to Dr. Treacy (Tr. p. 97) by the Presiding Judge.

We confess that we are unable to understand the argument of appellant and just what error is claimed to have been committed. The appellant's argument rather hints at two propositions—first, that the question was improp-

er, and, second, that it in effect was a charge to the jury as to the definition of total and permanent disability.

The question is not an improper one—the elements going to make up the question all appeared in the evidence, and no objection was made by appellant's counsel that it was not a correct recital of the facts that had been shown in the previous testimony, neither did appellant's counsel ask any further questions based upon any facts that might have been omitted from the question propounded by the trial judge. The questions that appellant's counsel had been propounding previous to this question of the trial judge were of a hypothetical nature, but did not include, or pretend to include, a full and fair statement of all the evidence upon which Dr. Treacy was expressing an opinion.

The jury could not have been mislead by this question, as the court explained (Tr. p. 98): "Well, we will have to put the evidence in there. We are putting a hypothetical question that the jury may have the benefit of expert testimony, and the jury may have to determine that."

The jury was fully informed at the time, that the question being considered was of a hypothetical nature, and in order that there might be no misunderstanding the court in its instructions fully and fairly defined "permanent and total disability," (Tr. p. 134), instructed the jury that they were the sole judges of the effect, value and weight of the evidence, and of the credibility of witnesses, that it was solely and exclusively the duty of the jury to determine the facts, and that this must be done from the evidence presented (Tr. p. 136), further instructed the jury that in determining their verdict, they should only take into consid-

eration the testimony of the witnesses upon the witness stand and such documentary evidence and exhibits as had been admitted (Tr. p. 137), and then "By no remark by the court during the trial, nor by these instructions or otherwise, does the court or did the court express any opinion as to the facts in the case. It is for you and not the court to determine what the facts are."

The cases cited by appellant under these assignments are not authority and can not be construed as authority that the court erred.

Order of the United Commercial Travelers v. Nicholson, 9 F. (2d) 7, involved an accident policy, and the court in the formal charge commented on certain testimony, but ignored other testimony, and the case was reversed for error in the formal instructions; in Cummings v. Penn. Ry. Co., 45 F. (2d) 152, the court was also considering the formal instruction.

It is thus to be seen that cases cited by the appellant under these specifications have to do with the formal instructions of the trial judge, and not one case is directed to a circumstance where the trial judge asks some question based upon the evidence in the case.

It is a rule apparently without exception in both Federal and State courts that the court has the inherent right to participate in the examination of witnesses, to elicit any evidence to show the truth; he is not a mere moderator, but has active duties to perform to see that the truth is developed, and in his discretion he may ask questions to elicit material evidence; many cases could be cited, but the following are illustrative of the principle:

Kettenback v. U. S., 202 F. 377, 385.

Edwards v. Seattle R. & S. Ry., 113 Pac. 563, 62 Wash., 77.

Dutton v. Territory, 108 P. 224, 13 Ariz. 7.

State v. Keehn, 118 Pac. 851, 857, 85 Kan. 765.

An interesting case in which the trial judge took a much more active part in the trial of the action is Brank v. United States, 60 F. (2d) 231, and the appellate court ruled that the trial judge was within his rights.

It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

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Attorneys for Appellee.

No. 7023

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

SIDNEY T. BURLEYSON,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS.

GEO. J. HATFIELD, U. S. Attorney, A. C. WOLLENBERG, Assistant U. S. Attorney, Post Office Building, San Francisco, California,
Attorneys for Defendant and Appellant.

JOHN L. McNAB, Esq., S. C. WRIGHT, Esq., 1 Montgomery Street, San Francisco, California,
Attorneys for Plaintiff and Appellee.

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 19,029-L

SIDNEY T. BURLEYSON,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT.

The above-named plaintiff complains of the said defendant, and for cause of action alleges:

I.

That at all the times herein mentioned plaintiff was and still is a citizen of the United States of America, and a resident of the City and County of

San Francisco, State and Northern District of California.

II.

That this action is brought under and by virtue of the War Risk Insurance Act and the World War Veterans' Act, and amendments and supplements thereto, and is based upon a term policy or certificate of war risk insurance issued under the provisions of the said War Risk Insurance Act, approved October 6, 1917, and acts amendatory thereto to the plaintiff by the defendant.

III.

That on or about the 30th day of July, 1918, at Paris Island, South Carolina, the plaintiff enlisted in the armed forces of the defendant; that he served defendant as a private of the United States Marine Corps until the 10th day of July, 1919, when he was honorably discharged from the said Marine Corps, and that during all of the said time he was [1]* employed in the active service of the defendant.

IV.

That immediately after enlisting in the defendant's said Marine Corps the plaintiff made application for insurance under the provisions of Article IV of the War Risk Insurance Act of Congress, and the rules and regulations promulgated by the War Risk Insurance Bureau established by said Act of

*Page numbering appearing at the foot of page of original certified Transcript of Record.

Congress in the sum of ten thousand dollars ($10,000) and that thereafter there was issued to plaintiff by the said Defendant's War Risk Insurance Bureau its certificate No. T..... of his compliance with the War Risk Insurance Act, so as to entitle him and his beneficiaries to the benefits of said Act, and the other Acts of Congress relating thereto, and the rules and regulations promulgated by the War Risk Insurance Bureau, the Veterans' Bureau, and the directors thereof, and that during the term of his service with the said Navy Department as aforesaid, there was deducted from his pay for such services by the defendant through its proper officers the monthly premiums provided for by said Act of Congress, and the rules and regulations promulgated by the War Risk Insurance Bureau, the Veterans' Bureau, and the directors thereof.

V.

That during the month of April, 1919, and while serving the defendant in its said Marine Corps, the plaintiff sustained fallen arches in both of his feet, and which condition later developed into what is known as thrombo engitas obliterance. That said disability has continuously since the date of his discharge from the defendant's Marine Corps rendered and still renders the plaintiff unable to follow his former occupation of salesman, or any substantially gainful occupation; and such disability is of such a nature [2] and founded upon such condi-

tions that plaintiff is informed and believes, and so states the fact to be, will continue throughout the lifetime of the plaintiff in approximately the same degree, or in a worse degree. That ever since his discharge from defendant's Marine Corps plaintiff has been permanently disabled as a result of the injury sustained by plaintiff while in the service of the defendant as aforesaid, and is now wholly and permanently disabled as a direct result therefrom.

VI.

That the plaintiff made application to the defendant through the United States Veterans' Bureau, and the director thereof, and to Veterans' Administration, and to the Administrator thereof, and through the United States Bureau of War Risk Insurance and the monthly payments due under the provisions of said War Risk Insurance Act for total and permanent disability, and that said United States Veterans' Bureau, and the director thereof, and the Veterans' Administration, and the Administrator thereof, and the said Bureau of War Risk Insurance, and the directors thereof have refused and still refuse to pay to plaintiff the amount provided for by the War Risk Insurance Act, and the amendments thereto; and on June 11, 1931 disputed the claim of plaintiff to the benefits of the said War Risk Insurance Act, and have refused to grant plaintiff said benefits, or any thereof and have disagreed with him in writing concerning his rights to the insurance benefits of said Act ever

since said 11th day of June, 1931; and on July 10, 1931 the Administrator of the Veterans' Administration in writing notified plaintiff that the action or finding of the Administrator that the plaintiff was not suffering from any disability which rendered plaintiff unable continuously to pursue a substantially [3] gainful occupation and complained of by plaintiff and appealed from was affirmed.

VII.

That under the provisions of the War Risk Insurance Act, and the other Acts of Congress amendatory thereto, plaintiff is entitled to the payment of $57.50 for each and every month transpiring since the date of his discharge from the said defendant's Marine Corps, to wit: July 10, 1919, and continuously thereafter so long as he lives, and continues to be permanently and totally disabled.

VIII.

That plaintiff has employed the services of John L. McNab, an attorney and counsellor at law, duly admitted to practice before this court, and all courts in the State of California, That a reasonable attorney's fee to be allowed to plaintiff's attorney for his services is ten per centum (10%) of the amount of insurance sued upon and involved in this action payable at a rate not to exceed one-tenth (1/10) of each of such payments until paid in the manner provided by Secttion 500 of the World War Veterans' Act of 1924.

WHEREOF, plaintiff prays judgment as follows:

First. That plaintiff since the 10 day of July, 1919, has been, and still is, totally and permanently disabled as a result of an illness and/or injury contracted in the line of his duty while in the active service of the United States of America.

Second. That plaintiff have judgment against the defendant for all of the monthly installments of $57.50 per month for each and every month from said 10th day of July, 1919, and so long as he lives and remains permanently and totally disabled. [4]

Third. Determining and allowing to plaintiff's attorney a reasonable attorney's fee in the amount of ten per centum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth (1/10) of each of such payments, until paid in the manner provided by Section 500 of the World War Veterans' Act of 1924; and such other and further relief as may be just and equitable in the premises.

JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Plaintiff.

United States of America,
Northern District of California,
City and County of San Francisco.—ss.

Sidney T. Burleyson, being first duly sworn, deposes and says: That he is the plaintiff named in

the above-entitled action; that he has read the foregoing complaint, and knows the contents thereof; that the same is true of his own knowledge; except as to those matters which are therein stated upon his information and belief, and as to such matters he believes it to be true.

SIDNEY T. BURLEYSON.

Subscribed and sworn to before me this 1st day of August, 1929.

[Seal] LAURA E. HUGHES,
Notary Public for the City and County of San Francisco, State of California.

My commission will expire May 16, 1933.

[Endorsed]: Filed Aug. 5, 1931. [5]

[Title of Court and Cause.]

ANSWER TO COMPLAINT.

The United States of America for answer to the complaint of plaintiff herein denies each and all of the allegations thereof.

WHEREFORE, defendant prays that plaintiff take nothing by his said action and that defendant have its costs herein incurred.

GEO. J. HATFIELD,
United States Attorney.

Service of the within answer to complaint by copy admitted this 4th day of Sept., 1931.

JNO. L. McNAB,
Attorney for Plaintiff.

[Endorsed]: Filed Sep. 4, 1931. [6]

[Title of Court and Cause.]

VERDICT.

We, the jury in the above entitled case, find in favor of the plaintiff, Sidney T. Burleyson, and fix the date of his total and permanent disability from following continuously any substantially gainful occupation from July 10, 1919.

ELDRED C. ABEL,
Foreman.

[Endorsed]: Filed Feb. 4, 1932. [7]

In the Southern Division of the District Court of the United States, for the Northern District of California.

No. 19,029-L.

SIDNEY T. BURLEYSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT.

This cause came on regularly for trial before the above named court, Hon. Harold Louderback, judge presiding, on the 2nd day of February, 1932 at the hour of 10 o'clock A. M.

John L. McNab and S. C. Wright appearing as counsel for the plaintiff, and George J. Hatfield, United States Attorney, and A. C. Wollenberg, Assistant United States Attorney for the Northern District of California, appearing as counsel for the defendant.

A jury of twelve persons was duly and regularly impaneled and sworn to try said cause. Witnesses on the part of plaintiff and defendant were sworn and examined, and documentary evidence on behalf of the plaintiff and defendant was introduced; and after hearing the evience, the arguments of counsel and the instructions of the court, the jury retired to consider their verdict, and subsequently returned

into court their verdict in words and figures as follows, to wit:

"We, the jury in the above entitled cause, find for the plaintiff, Sidney T. Burleyson, and fix the date of his total and permanent disability from following continuously any gainful occupation from July 10th, 1919.

February 4th, 1932.

E. C. ABLE,
Foreman." [8]

And the court having fixed plaintiff's attorneys' fees in the amount of ten per centum (10%) of the amount of insurance sued upon and involved in this action.

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, Sidney T. Burleyson, do have and recover of the United States of America the sum of eight thousand six hundred and seventy and 84/100 dollars ($8,670.84), as accrued monthly installments of insurance at the rate of fifty-seven and 50/100 dollars ($57.50) per month, beginning July 10th, 1919.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the defendant, United States of America, deduct ten per centum (10%) of the amount of insurance sued upon and involved in this action and pay the same to John L. McNab and S. C. Wright, plaintiff's attorneys for their services rendered before this court, payable at the rate of one-tenth (1/10) of

all back payments, and one-tenth (1/10) of all future payments which may hereafter become due on account of said insurance, said amounts to be paid by the United States Veterans' Bureau to said John L. McNab and S. C. Wright out of any payments to be made to Sidney T. Burleyson, or his beneficiary in the event of his death before two hundred and forty (240) of said monthly installments have been paid.

Judgment entered February 4th, 1932.

WALTER D. MALING,
Clerk.

O. K. as to form only
Geo. J. Hatfield,
by A. C. W. [9]

[Title of Court and Cause.]

DEFENDANT'S ENGROSSED BILL OF EXCEPTIONS.

To the plaintiff above-named and to John L. McNab, attorney for plaintiff:

You, and each of you, will please take notice that the attached constitutes defendant's engrossed bill of exceptions.

GEO. J. HATFIELD,
United States Attorney, Attorney for Defendant.
[10]

[Title of Court and Cause.]

ENGROSSED BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 2nd day of February, 1932, the above entitled cause came on for trial; Messrs. John L. McNab and S. C. Wright, Attorneys, appearing for the plaintiff, and Messrs. Geo. J. Hatfield, United States Attorney for the Northern District of California, and A. C. Wollenberg, Assistant United States Attorney for said district, appearing for defendant; a jury was impaneled and sworn and thereupon the following proceedings took place:

"Mr. McNAB.—If your Honor please, during the course of the opening statement, there was some controversy over why the case was reversed, revolving around the discussion of a disagreement with the Bureau, and I have here the written disagreement of the Veterans Administration Bureau which I think the United States Attorney will admit——

Mr. WOLLENBERG.—Yes, I will stipulate to the disagreement.

The COURT.—Of course, he has stipulated that that fact is proved. Do you wish to use it?

Mr. McNAB.—In view of the admission, if your Honor please, the notification is of date of July 10th, 1931, and has to do with his disability. I will offer it in evidence but will not ask it [11] to be read at the present moment.

The COURT.—It will be received as plaintiff's Exhibit No. 1 in evidence."

(Exhibit No. 1 attached hereto.)

TESTIMONY OF SIDNEY T. BURLEYSON.

Sidney T. Burleyson, the plaintiff, called in his own behalf, being first duly sworn, testified as follows:

My name is Sidney Theo Burleyson. I live near Belan, Mississippi, and am thirty-two years old at present. I enlisted in the armed service of the United States in Memphis, Tennessee, in the United States Marine Corps, at the age of eighteen. Outside of about three weeks or a month up to that time I had always been on a farm near Belan, Mississippi. I had no particular training except on the farm, where I farmed and spent my life. I had gone to the tenth grade in school. I had no training in any particular pursuit in life except I had three weeks occupation as a clerk in a drygoods store, a wholesale drygoods store in Memphis. After my enlistment I went to Paris Island, South Carolina, where I had training. From there I went to Quantico, Virginia. I was ill in Quantico with influenza. I left Quantico for Vladivostok with the Marines. Prior to my departure I had been ill for about six weeks. The hospitals were all filled and I was in a temporary hospital in the barracks for

(Testimony of Sidney T. Burleyson.)
about a month and then in convalescent camp about two weeks. A short while after I left convalescent camp I embarked for Vladivostok. The first port on the Pacific we touched was San Diego, the next Honolulu. Before we arrived in Honolulu my throat was sore all the time and I coughed. About the second day after I arrived at Honolulu, and while I was on board ship I was stricken with appendicitis. They took me [12] to Pearl Harbor and I had an operation for appendicitis with a general anaesthesia. I was in the hospital about twenty-three days before I was discharged. They took my tonsils out also before I was discharged. I had not been removed from my cot at the time my tonsils were extracted by a local anaesthesia. After the removal of my tonsils I was discharged from the hospital in four or five days. They sent me to the barracks on light duty. They had me moving some cans around in the morning, and cleaning up around the building. I actually found the work heavy. In a few days after that I was ordered for duty—heavy duty, I mean drilling, heavy duty. After I commenced drilling I had a terrible pain in my legs from my knee down into the calf of my leg, in both legs. It was a terrible pain, went into my feet and my arches fell and began to swell up. The arches crushed down. Prior to that time there had been a normal arch in my feet. The sole of my foot started to turn red. They were flat and broken down. The arch flattened out. After about a week,

(Testimony of Sidney T. Burleyson.)

I guess, it finally quit. About a week elapsed between the falling of the arch until it was flat. During that time I was drilling. After that time I was sent to the hospital at Pearl Harbor Navy Hospital. I had a terrible pain in my legs and feet up into the calf of the leg to below the knee. It didn't bother me much above the knee, just below. I remained in the hospital about six weeks. During that time they treated me with hot salts or something like that—epsom salts. At the expiration of that time they held a medical survey. About three or four surgeons attended the survey which was held in the Islands.

(Plaintiff's Exhibits 2 and 3 attached hereto.)

[13]

I made no application for any certificate, had nothing to do with it. They said I wasn't fit for further duty and I was sent to Mare Island and discharged. I had never made any application for a discharge or any other kind of release. I was just ordered discharged by the surgeons. When I came back to Mare Island my feet and limbs turned a reddish color up to my ankle and it was terrific painful. No further examination was given to me at Mare Island, they just called me up and made me sign a waiver. I haven't my formal discharge. I think it was in evidence at the former trial.

(Military record and order of discharge admitted and read into evidence as Plaintiff's Exhibits 2 and 3 respectively.)

(Testimony of Sidney T. Burleyson.)

About three days before I was discharged two petty officers brought around the waiver. I asked what it was and one of them, holding his hand over the writing, said "Never mind, just sign." I wouldn't sign it and he went and got the commander and he told me to sign it, so I signed it. That is what is known as a waiver. I could only see part of it and I waived all claim for compensation and hospitalization. I understood when I signed it that I had no more claims. They made me sign it.

Mr. McNAB.—Q. Wasn't there a time when you discovered that that waiver wasn't a bar to your rights?

The COURT.—That is what he believed to be a waiver.

Mr. McNAB.—Yes.

A. In 1925, at Taft, California, I was then sick. I talked to a veteran and he said "Why don't you write in? I think you can get that all straightened out." I wrote to the Los Angeles office of the Veterans Bureau in January of 1925 and asked for treatment and compensation but I never received a reply to it. I figured they had looked it up and seen— [14] well, they didn't answer my letter.

Mr. McNAB.—Q. Did you keep a copy of the letter which you wrote?

A. Yes, I did.

Q. I show you what purports to be a letter dated the 11th day of January, 1925, from Taft,

(Testimony of Sidney T. Burleyson.)

California, and ask you if that is a carbon copy of the letter that you wrote at that time?

A. Yes, sir, it is.

Q. To that letter did you ever receive a reply?

A. No, sir, I didn't.

Q. Or the year 1925, or at any time prior to October 2, 1928.

A. No, sir.

Q. I show you a letter from the United States Veterans Bureau from San Francisco October 2, 1928, and ask you whether or not that was the first time you ever heard from that letter?

A. Yes, sir.

Mr. McNAB.—I offer this in evidence.

The COURT.—In other words, you want to present both letters?

Mr. McNAB.—Yes.

The COURT.—I will allow it. Both will be received as one exhibit. They will be received as Plaintiff's Exhibit 4.

(Plaintiff's Exhibit No. 4 attached hereto.)

The WITNESS.—Although the letter of October, 1928, refers to a letter written to me from the Los Angeles Bureau, I never received such a letter nor did I receive any blanks or anything like that from them. (Information blank of the United States Marine Corps received in evidence by stipula- [15] tion and marked Plaintiff's Exhibit No. 5 and read.)

(Plaintiff's Exhibit No. 5 attached hereto.)

(Testimony of Sidney T. Burleyson.)

I did not have flat feet prior to my enlistment. I was a well man prior to my enlistment into the Marine Corps. (Reading of Exhibit No. 5 continued.) At the time of my enlistment I knew of no physical defects that I had. I had never suffered from fallen arches or flat feet or with a case of pains and I was conscious of no physical defect in any way. I was a well man. I had spent my life on a farm. At the time of my discharge I was afflicted as I am now. It has developed since that time until now I can not get around very much. It is worse now. As regards the pain, it was almost the same as it is now. The pain first started in the leg and went down to the feet. My arches and toes showed discolor, very red, later on turned bluish color and swelled up. The skin had abscesses form that came open in the toes, pus ran out of them and the skin cracked. I used hot salt water on them until I learned later to elevate my feet as much as I could.

I have endeavored to work since my discharge. The first time I ever went into the Bureau was in 1926 and they granted my application, and up until that time I didn't believe I had the right to go there for treatment. I had no source of income upon which to rely. I took medical treatment from time to time. I had to work in order to live. I first endeavored to work at Mare Island, clerical work. I was given a rating of rivet heater. I did no riveting work. I worked less than two weeks

(Testimony of Sidney T. Burleyson.)
around the yard and then was transferred to the office. Worked there a short while, less than two weeks, and then I worked around the yard, and then I was transferred into the office. I first had to go as a machinist; they got me a rating as a [16] machinist's helper. They afterwards put me as storeman. I went to work about two weeks after my discharge and was there about a year. I rested a good deal. I took care of the serial numbers on gasoline and kerosene drums, that was my chief work. Most of the time I had to go around the yard looking them up. It made my feet swell up and look terribly bad. I did not undergo medical treatment at the Island. I thought if I went there they would let me out. I used the hot salt water and stayed home whenever I could. The Navy doctor at Pearl Harbor told me to keep my feet elevated as much as I could. Whenever I wasn't carrying on my duty at Mare Island I took care of my feet, putting them in salt water or keeping them elevated. During the time I was at Mare Island I was never free from the pain. I was off duty part of the time. Mr. Coats, the chief clerk there, let me off to go home. I always went to bed, laid on the bed and rested. I eventually left the island because it got so bad. I had to run around the docks so much that I left. I left for no other reason than that I was unable to carry on the work and went to Boyd's Hot Springs and took two weeks of mineral hot baths. I was able to be off

(Testimony of Sidney T. Burleyson.)

my feet and it relieved me a little bit, but when I went back to work it was the same thing again. I was off about a month and paid my way at Boyd's Springs out of my earnings. I attempted to get work at the Southern Pacific. The swelling went down in my feet and when I came to town it started up again.

No examination was made of my feet when I went with the Southern Pacific. I did not disclose to them the fact that I was suffering with bad feet. I was afraid I couldn't get a job if I did. I got a job as a cashier, sitting most of the time, at Tracy. I worked there two weeks and got pretty bad but it was only a temporary job. When I got back [17] to town I took about two weeks off, laid around the hotel taking treatments. I had no pains during this time. I used the hot water and salt and elevated my feet and got relief in that way. There was no time during this period that I was free from the pain and my feet were swollen. Then the Southern Pacific sent me to Yuma, Arizona, as a clerk, mostly sitting. I worked about eight months I think. I was not free from pain while I was there. I worked because I had no other way to live. I did not feel able to work. I got very bad and the heat seemed to affect me too and make me worse. I came back to California because I felt I would get relief again. I laid around town a while and then went over to Oakland and got work at the Merritt Hotel as a night clerk. During

(Testimony of Sidney T. Burleyson.)

that work I got a couple of chairs when there was no one around and I would sit and rest and hold my feet up. I went to some physicians but I don't remember who now. No physicians ever gave me relief from my pain and I was feeling pretty bad, so I laid off quite a few months, I think half a year. There has never been a time since I left Honolulu that I could stand on my feet without severe pain. When I stand for any length of time, either with or without crutches, my lower limbs get a bluish color. At the present time I am at Letterman General Hospital. I have been there seven weeks. I have been confined to bed there and this is the first time I have been out of bed. I didn't get up until nine o'clock to come here. This is the first time in seven weeks I have been anywhere other than Letterman Hospital. The effect of coming down today has made my feet swell up and turn blue. They bother me always.

Q. Now at the time you had your examination, before you were discharged from the hospital at Honolulu, [18] to your knowledge, was any pulse taken of the circulation in your ankle?

A. They never took it until I went to Letterman Hospital.

Q. You mean recently?

A. No, before; I was there some time ago, a few years ago.

Since my discharge I have learned that I could go to Letterman Hospital. I have been at Palo

(Testimony of Sidney T. Burleyson.)
Alto twice and Letterman. The first time I went to Veterans' Bureau Hospital at Palo Alto it was in 1928 for eight or nine months. Most of the time in bed. They gave me hot and cold water treatments and violet ray lights and then put a cast on my foot, a plaster cast. I have never been able to get on my feet since the plaster cast was on. It got so bad that in the middle of the night I asked one of the boys to get a knife. I was going to take it off myself. I called a nurse and the officer of the day but he was out so I told the boys to get me water and a knife. They asked what for and I said "Never mind." They called a doctor and he gave me a shot in the arm and the next morning took the cast off. I got some relief after it was taken off. I got worse after being at the Palo Alto Hospital. I came to San Francisco for a few days and then went to Letterman General Hospital and remained there five months. I went back the second time to Palo Alto hospital for about six or seven weeks one time. As a result of all these treatments in the hospital there has been no improvement. The doctors have told me the diagnosis of the disease. While I was in the hospitals at Letterman I took some serum in the arm and hot and cold water, keeping my feet elevated a good part of the day. Yes, the doctors have informed me of the diagnosis of the disease. [19]

The various employments I have entered into have been for the purpose of earning money for

(Testimony of Sidney T. Burleyson.)

my treatment. I have had private physicians from time to time. Dr. Eidenmuller has been familiar with my case for about five years and I paid him myself out of my earnings. I consulted Dr. Moody at Taft and Dr. Cheny. I worked for a time at a hotel at Tahoe and there consulted Dr. Guy Wallace. There has been no place that I have worked that I have not been under the care of a physician. There has been no time since my discharge that I have ever been relieved of pain. I was employed for a while at the Hotel Worth in the capacity of night clerk. The duties called for me to move around very little—when nobody was in and I wasn't working I kept my feet elevated. I always put a chair, after twelve o'clock it was very seldom that anybody comes in. I worked from eleven at night to seven in the morning. I lived at the Hotel Herald. I did not perform services at the Hotel Herald. I was at Lake Tahoe Tavern four or five months under the care of Dr. Wallace, the house physician. I did not disclose to any of them that I was suffering from this affliction. I could have got treatment if it went on the record but I would probably be discharged so it was called chronic. Dr. Wallace told me, being a mighty fine man, that he would put it down chronic, because I might be discharged. I was trying to get employment and trying to hold it. I have never been able to hold any position for any length of time. There is nothing I know of or have known of for years past that I

(Testimony of Sidney T. Burleyson.)

can turn my hand to and employ myself at steadily. I know of no occupation that I was able to be employed at except temporarily. I have never left any position for any other reason except by trouble.

Q. You have never been discharged? [20]

A. No sir.

Q. In the last four or five years have you done any work?

A. No sir.

Q. These last four or five years have been taken up how?

A. In hospital and with doctors' treatments outside.

Q. Doctor; independent physicians outside. They were paid by whom?

A. By myself.

Q. Paid by yourself. Do you know of any gainful occupation whatsoever that you might be able to turn your hand to now in order to make a living?

A. No, sir.

If I had any, I would be willing to try it. I was actually at the Lake Tahoe Tavern about three months. While there I was under the care of Dr. Guy Wallace. I was also employed at Del Monte. At Del Monte my feet got terribly bad so Mr. Matthew, Assistant Manager, came to me and said "What is the trouble, you hobble along?" I said "My feet." He said "I have a pair of slippers upstairs, I will bring them down." That was a day or

(Testimony of Sidney T. Burleyson.)

two before I quit. The last few days there I was in bed.

There has been over four years now since I have been able to wear shoes. Customarily when I am out of bed I usually wear heavy woolen socks and slippers. The left foot is the worst. I can detect no pulsation at all in the left foot. That has been the case with the left foot about four years. With the right foot I am told there is a little pulsation inside, none on top. It is farther down. In an effort to perfect myself for any position, any work, for a [21] while I attended Heald's Business College, went to night school four months I guess. I paid my own tuition out of my earnings.

Cross-examination of Sidney T. Burleyson
by Mr. Wollenberg.

Between the time of my letter to the Veterans Bureau dated January 11, 1925, and the letter I received from the Veterans Bureau dated October 2, 1928, I had nothing to do with the Veterans Bureau nor did I hear from them. I wasn't near them. I figured it was no use after I signed the waiver. I did file a claim for compensation with the Veterans Bureau on December 14, 1926. And I wrote a letter to Los Angeles and I never did get an answer from it. It is here. I did contact the Bureau personally on that date and filed a claim and I had a physical examination at that time made by the Veterans Bureau and I was in contact with

(Testimony of Sidney T. Burleyson.)

the Veterans Bureau about my condition from that time in 1926 on. I can identify that document as the claim which I filed with the Veterans Bureau on December 14, 1926. It is entitled "Application of Veteran Disabled in the World War for Compensation and Vocational Training." I was asking for compensation and medical attention and advice.

Immediately after my discharge I went to work at Mare Island. I don't know the exact number of days but it may be two or three weeks after, I don't recall now. I was discharged on July 10, 1919. I am not sure of the date I was discharged. I remained at Mare Island as an employe of the government about a year, taking serial numbers of drums, kerosene drums, turpentine, etc. I handled cards at the U. S. California, time cards and things like that.

Q. You were employed there in a purely clerical [22] capacity?

A. I went on the ship for a little while, but they arranged it so it was as when I started at the beginning; just a few days.

Q. Do you remember the title of your position there for the most part, other than those few days that you worked as a riveter?

A. Handling cards.

Q. What were you, a clerk of some sort.

A. They held it rated as a riveter, but I was checking time cards down along the ship where the men were working.

(Testimony of Sidney T. Burleyson.)

Q. How long were you there continuously?

A. Thirteen or fourteen days.

I was there thirteen or fourteen days. Then I was in a clerical position at the oil house, I think it was, where I worked until I left.

Mr. Wollenberg. Q. How long did you work in this other capacity at the oil house?

A. Until the time I left.

Q. Well, other than the few days you worked in the clerical position keeping time cards, and the time you worked as a riveter and machinist's helper, which you say was a short time, the rest of the year was spent at clerical work at the oil house, is that correct?

A. Yes sir.

I said I left because my legs bothered me and my feet were so bad I went to Sutter's Hot Springs for treatment. I resigned to go up there.

A. I was there on my vacation.

Q. On your vacation? Then did you return to Mare Island? [23]

A. No, I didn't work any more there.

Q. Now were you a civil service employee at that time, of the Government?

A. Yes, the last job.

It was not a fact that I left that employ because someone in priority in civil service rating was entitled to the job. They didn't let me out, I resigned. The records will show my resignation. There was no question of civil service priority in 1921. I

(Testimony of Sidney T. Burleyson.)

wrote out a formal letter and sent it in when I resigned, about August 20, I don't recall the exact date; I resigned of my own accord. At the time of that employment I had a physical examination. They just went over our hearts and lungs and things like that. It wasn't much of an examination. They didn't look at my feet at all.

Q. Did they make any report in connection with that examination? Do you recall whether they made any report in connection with your feet?

A. No.

Q. You don't recall them questioning you about your feet at all?

A. No, sir, they didn't.

I don't recall whether they made any report in connection with my feet nor questioning me about my feet, and I said nothing about my feet because I didn't want them to know about them.

My next employment was with the Southern Pacific Company as cashier in the dining-car, hotel and restaurant division. I was there about thirteen days. I don't know the exact date. It was about August 25, 1920. I don't recall the date. My average wage at Mare Island was about $120. a month. I think it averaged that over the year. My [24] best recollection is that I was at Tracy about two weeks. I received the salary of $105. a month. It included found. I roomed at the Southern Pacific rooming-house. That was included and my board was included. I took the position at Tracy

(Testimony of Sidney T. Burleyson.)

as a temporary position to fill until someone else came back. I was there thirteen days, and then came back to San Francisco and Mr. Wright wanted to send me to Indio in the Imperial Valley. I wanted to lay off. When I came back in two weeks they sent me to Yuma, Arizona. That was to be a permanent position. I worked at Imley, Nevada, also. That was after I went to Yuma. I was in Yuma seven or eight months. At Yuma my wage was $115. and room. It was clerical work. We used to buy supplies for the diners, specialties, etc. When I left Yuma I came to San Francisco. I left the Company. It was some time in 1921 and I didn't go back to the Company until a year afterwards. Before I went to work for the Southern Pacific Company I had to pass a physical examination. They looked over my heart. They didn't look over my feet though. I went to the doctor for the examination. There was no mention made at all of my feet in that examination. They didn't ask me anything about my feet. After I came back from Yuma I went to work at the Merritt Hotel about six weeks afterward. I think it was in May or June but I don't recall, during the summer of the year, about May, 1921. Five or six weeks after that I went to work at the Merritt Hotel, I don't know the date. I was at the Merritt Hotel eight or nine weeks, I guess, around two months. At the Merritt Hotel I was paid $75.00 a month and room and board.

(Testimony of Sidney T. Burleyson.)

When I left the Merritt Hotel I didn't go to work, I laid off a number of months. I don't think I did anything until I went to Del Monte in the early part of 1922, April [25] or May, I don't know the date. I don't remember whether or not I did any other work from the time I left Yuma until I went to work at the Del Monte except the Merritt Hotel work. I could have gotten a job during that time but I wasn't feeling good.

Q. You could have got one; had you been looking for one?

A. No, I didn't want to go on when I knew I would have to quit in a few days.

I didn't want a job. I worked at Del Monte about two months, in the storeroom, store clerk and other jobs. I don't remember what I got at Del Monte, I think it would be $70. and found. Found includes room and board. From Del Monte I came back to San Francisco and went to work again for the Southern Pacific Company. They didn't examine me physically when I came back to the Southern Pacific Company because I had not been out but a year. I believe that this was in July or August of 1922. They put me to work at Tracy again and I worked there until October of 1922. I then came back to San Francisco. The second employment at Tracy lasted about two and a half months or three months, something like that. Then I went to work for the Southern Pacific at Imlay, Nevada. I went there in November of 1922 and stayed until April or May of 1923. My salary there

(Testimony of Sidney T. Burleyson.)

was $90. and found. I was cashier at the hotel. After leaving there I went to Bowie, Arizona, for the Southern Pacific Company doing the same thing. While I was working for the Southern Pacific Company I was not known as a temporary cashier. Each time I moved they transferred me because someone else came back. It was sort of permanent position. They would transfer me by wire. I would be at Yuma or another place for seven or eight months and then they would [26] transfer me. I was always subject to transfer when someone else came to relieve me. The whole department of the Southern Pacific is run that way. I don't know whether other cashiers were sent around the same way, but my experience is that we always went from place to place as we were ordered.

I was at Bowie, Arizona, for forty days I think and then came back to San Francisco. Then they sent me to Indio, California, in the same service in the same position as cashier. Each time I went from one job to another it was by wire sent me from the headquarters of the dining-car service in San Francisco. I was in Indio for three months. After that I resigned. It was around August of 1923. I don't remember the exact date, it was so long ago.

While I worked for the Southern Pacific Company the wage was always around $100. a month and found, some of the positions paid more than others. Sometimes it wasn't that much. At Indio

(Testimony of Sidney T. Burleyson.)

it would average about $90. a month, plus board and room. Some of the positions had no board and room and some no board, but room. I think at Bowie I received $90. a month and room and board. I resigned from the Southern Pacific about September of 1923 at Indio, came back to San Francisco and laid off for quite a while, I don't know how long, but several weeks. I don't remember whether it could have been two weeks.

I went to work for the Emporium in San Francisco for five or six months. It was around May of 1924. I received $85. a month as a receiving clerk. In May of 1924 I left the Emporium and went to work at the Fox Hotel in Taft. I worked there about nineteen months as hotel clerk at a salary of $125. a month. I didn't receive room or board at Taft. I worked there until about June of 1926. I don't [27] remember any other work that I have done up to June of 1926. That is all I can remember. Up to that time I had seen a number of private doctors about my feet. I saw two doctors in Taft when I was there. I saw a number of doctors in 1926, one in Oakland. I don't remember his name. When I came in from Yuma, when I left the Southern Pacific the first time, I went to Los Angeles and saw an orthopedic. He made me a special pair of arches but I couldn't wear them. That was when I came from the desert I saw him. I don't remember his name. I just saw him in Los Angeles on my way through. The doctor at Taft

(Testimony of Sidney T. Burleyson.)

was Dr. Moody and I saw another doctor there. I don't remember his name. I had flat feet at that time. I have had that condition ever since my discharge. I didn't tell any of the doctors who had examined me for any of my jobs, nor did any of them notice my feet. Had I told them, I wouldn't have had a chance to get work. They would have disqualified me. The doctors at Mare Island just looked me over and passed me on my heart and lungs. A navy doctor made the examination there. He told me when I left the Marine Corps what I was to do and how I was to take care of myself. A navy doctor directed me as to what to do when I was discharged from the Mare Island Hospital and one of the doctors at the Mare Island Hospital examined me within a week or so after my discharge. I don't know the exact date, and he said nothing about my feet. From that time down to June of 1926 I don't recall the names of any doctors who examined me except Dr. Moody of Taft. I didn't get receipts from them, I always paid. After I left the hotel at Taft I went to work at the Tahoe Tavern as clerk. I think it was in [28] July of 1926, immediately after I left Taft, about the 20th of July, it could have been July 17, 1926. I was there about three months. When I left there the season was closed down and I was laid off for a little while and they sent me to the Whitcomb Hotel at San Francisco.

(Testimony of Sidney T. Burleyson.)

Q. When you left Tahoe Tavern isn't it a fact that the season was closed and the hotel closed down?

A. They sent me to the Whitcomb Hotel. I laid off for a little while and then came down.

Q. Did you say you left Tahoe Tavern because you couldn't stand the work any more, and resigned?

A. No, it was closed, but they sent me to another place to work. It was the same chain of hotels.

I laid off for about two weeks before I went to work at the other place and went to work at the Hotel Whitcomb. At Tahoe Tavern I received the salary of $125. a month and found, which includes room and board, and then went to work at the Hotel Whitcomb where I received $90. a month and meals. I worked there for about five weeks. It was a regular job and I am sure of that. I don't remember the exact date but it was about five weeks after that I left, about December of 1926, between the 3rd and 6th I think.

I was next employed at the Hotel Granada as a hotel clerk. I was there a little over two months I think, at $75. a month and found. Found includes room and board. I left the Granada after two months and went to work at the Hotel Worth, where I worked a little over a year at a salary [29] of $125., no room and no board. That would bring us down to August of 1928. I was in the hospital

(Testimony of Sidney T. Burleyson.)

in July of 1928. I was off quite a few days during 1928, let someone else work in my place and I paid them myself. It was about July of 1928 I left the Hotel Worth and went to the hospital at Palo Alto.

After my discharge from the hospital at Palo Alto I came home for about two or three weeks and then went to Letterman General Hospital and since that time on I have done no work. There was a period in 1924 when I attended Heald's Business College. It was about four or five months and I went there at night during the time I was working at the Emporium. Quite a few times I was not regular in my attendance, I didn't go. It has been four years since I have earned anything. I have no income at the present time.

During the time I was in the service at Quantico, Virginia, I got sick but I went back to duty shortly afterwards. My estimate of the time I was in the hospital at Pearl Harbor in connection with my appendicitis about twenty-two or twenty-three days. A few weeks after my discharge from the hospital at Pearl Harbor my arches dropped. I went to light duty for a while and when I returned to heavy duty the trouble developed. I don't recall the number of days that it took my arches to drop from normal. I guess it was about four or five or six days.

(Testimony of Sidney T. Burleyson.)

Redirect Examination.
by Mr. McNab.

When I was sick and took these various employments I did not feel physically able to work. I had to live. I had no other sources of income but my labor. When I laid off these various positions I treated myself. I was never discharged from any of them. When I left the naval service at [30] Mare Island, a naval surgeon gave me instructions as to what to do in the matter of caring for myself. None of them ever advised me that I could be cured. There have been a number of physicians and surgeons that I have consulted over the course of years. I never kept track or kept any statement, I just went to their offices. I remember two doctors at Taft, one in Los Angeles and one at Lake Tahoe, and Dr. Eidenmuller. I don't recall the names, and there was one in Oakland in 1921. Notwithstanding the advice and treatment they gave me, I got no relief.

Recross Examination
by Mr. Wollenberg.

I testified that I had no other income over this period of time other than the money brought in by my own labor.

TESTIMONY OF LIEUTENANT FREDERICK C. KELLY,

called for the plaintiff and sworn:

I have the rank of lieutenant in the military service and I am a regular physician and surgeon, receiving my training at Rochester University, Wisconsin. I have been in the government service since November 12, 1929. My first hospital was a small one situated in Northern Michigan. From there I was ordered to the army medical school at Washington, D. C., from there to the Medical Field School at Carlyle, Pennsylvania, and from there to Letterman General Hospital, San Francisco, where I have been since June 12. I am in the general medical section there and know the plaintiff in this case, Mr. Sidney Burleyson. He came under my observation first on January 7, 1932. From that date down to the present he has been under my constant observation. I had diagnosed the case as thrombo angiitis obliterans. It is a rather rare [31] disease. I myself have contributed a medical treatise on this particular subject. I have written monographs for the medical profession on this disease with which he is afflicted. The disease is best known or described by the name thrombo angiitis obliterans; thrombo means "clot"; angiitis means "inflammation of a blood vessel," and obliterans means "obliteration." Of its cause, nothing definite is known. There are many conjectures but nothing has been proven by workers on the subject. In the blood vessels themselves the first thing that happens is the

(Testimony of Lieutenant Frederick C. Kelly.)

thickening of the inner lining of the blood vessel; the next thing is a laying down of a soft clot in the blood vessel. Following that, this clot is gone. By that we mean that there is scar tissue and active tissue as well comes into the clot, and the clot goes on to gradually and eventually cause obliteration of the blood vessel. One of the usual concomitants is much pain. There is usually two types of pain, one type of pain is that which is brought on by exercise relieved by rest, the other is present when there is rest and is present at all times.

I have had an opportunity to observe Mr. Burleyson during this period of time. He seemed to be suffering constant pain. It is a progressive disease, from the mild form to a more severe. As time goes on it becomes progressively worse. There is nothing known to the medical or surgical profession which will result in complete cure. Something can be done for improvement but not for cure. I can not say whether or not he will ever be better than he is at present. I don't believe he will obtain relief without surgery. Ultimately, without some relief, this congestion in the blood vessels will result in gangrene, and gangrene must be eliminated by amputation. That is a thing that will always be considered in this case. To avoid amputation you have to [32] undergo a long period of hospitalization with intensive treatment. I am not familiar with the statute which prescribes total and permanent disability. Having in mind the defini-

(Testimony of Lieutenant Frederick C. Kelly.)

tion to be "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation," my opinion is that the plaintiff is permanently disabled and has been at all times since he has been under by observation.

Mr. McNAB.—Q. Lieutenant Kelly, are you familiar with the statute which prescribed permanent and total disability, as not being able to continuously pursue a gainful occupation?

A. I am not familiar with it, no, sir.

Mr. McNAB.—I will read it to you from the definition, as defined in the statute, "any impairment of mind or body which renders it impossible for the disabled person to follow continuous any substantially gainful occupation." Now doctor, having that in mind, is this plaintiff permanently disabled within the definition I have read to you?

A. He is.

Q. And has he been or has he not been at all times since he has been under your observation?

A. He has.

Q. Doctor, it has been testified here by the plaintiff—ever since your observation of him at Letterman Hospital, you have had occasion to familiarize yourself with the history of the patient, including an operation for appendicitis, and a subsequent operation for the removal of the tonsils, and a subsequent falling of the arches, and other trouble——

(Testimony of Lieutenant Frederick C. Kelly.)

The COURT.—In other words, did you hear the [33] testimony of the witness today?

A. Yes.

Mr. McNAB.—That is correct. You have listened to the testimony of Mr. Burleyson while he has been on the stand?

A. Yes sir.

Q. State whether or not the symptoms to which he testified during the period that he was in the Government service, are, in your opinion, indicative of the existence of the disease which you have just testified to?

A. It is perfectly possible for them to be.

Q. Are the symptoms at the present time anything more than the likely development of those symptoms; in other words, it is a progressive trouble?

A. It is a progressive condition.

The COURT.—Q. From the statement made by plaintiff, if you accept his statement to be true, do you feel that he was totally and permanently disabled at the time of his discharge from the service?

A. I believe he was, yes sir.

Cross-examination
by Mr. Wollenberg.

When I gave my opinion regarding permanent disability I had the definition in mind as stated to me. I heard all the testimony of the plaintiff in this

(Testimony of Lieutenant Frederick C. Kelly.)
case and I heard the work record of this man from 1919 to 1928, a period of nine years, my history.

Q. How do you reconcile that work record with this history in your mind?

A. It does not conform to the definition. It was not a continuous work record.

Q. You are therefore going on the basis as to [34] whether the man was continuously at work; basing your opinion entirely upon that statement are you, and the question of the definition?

A. What do you mean, reframe the question.

Q. You are basing your statement of total and permanent disability as your opinion entirely upon the question of the continuity of the work?

A. No, sir, I did not. I am passing it upon the man's physical condition in accordance with that definition.

The COURT.—Well, doctor, the circumstance is this, I presume, that you feel that if he has stated correctly to you his condition and as to the time, that he was unfit to follow any employment; you don't say he couldn't have done the work indicated, but you think in doing so he was impairing his health; in other words, a man might have consumption and still continue at a task, although in doing the work he is shortening his life, is that your idea? He was hurting himself when he did that work?

A. Yes sir.

(Testimony of Lieutenant Frederick C. Kelly.)

Mr. WOLLENBERG.—Q. What authorities on this particular disease agree with you in your opinion as to the line of work the man can perform, suffering from this illness.

A. Well, I again give you three authorities in the Mayo clinic who state that part of their treatment is absolute rest in bed. They are Dr. Allan Bean, Dr. Mahoney, of the Mayo clinic.

Q. Are you familiar with Dr. Leo Buerger's treatment; this disease is sometimes known as Buerger's disease?

A. It is.

Q. Named after Dr. Leo Buerger of Los Angeles, and New York, whose name has—well, you might say they have [35] called this specific illness or disease after him, is that correct?

A. He is the first one to give a comprehensive report of it, although it was described long ago before his description of it.

Q. And from his report it has taken his name to a certain extent?

A. Yes.

Q. The common name would be Buerger's disease?

A. Yes.

Q. Does Dr. Buerger agree with you on your statement of the industrial side of the case?

A. I don't know.

Q. Doctor, you stated also that the symptoms indicated here this morning were the symptoms

(Testimony of Lieutenant Frederick C. Kelly.)

of this disease; will you enumerate those symptoms that you consider the primary symptoms of Buerger's disease or thrombo angiitis obliterans.

A. The symptomology.

Q. Yes, as enumerated by the plaintiff.

A. The first thing the plaintiff complained of was pain in his leg, the greater portion of the time, in the calf of the leg. He notices that this is brought on by exercise and gradually becomes worse. An individual will be able to walk five miles in the incipiency of the thing, but as time progresses he may only be able to take fifty paces before it comes on. This gives us a chain of causation. The next thing he notes is his feet are cold the majority of the time. He notices that when his feet are on the floor they become red, or reddish blue. He notices that when he elevates them they become pale and pallid and the doctor also notices that there is very noticeable diminutions of normal palpation of the feet.

Q. That diminution of absence of pulsation of the [36] blood vessels of the feet, that is a very important thing, I mean relative to the diagnosis of the disease?

A. Yes sir.

Q. If it was shown in October of 1928 from an examination of Doctors George J. McChesney and Dr. Leo Eloesser, that upon examination of this man they found a pulse in his feet, and their report stated that there was no diminution of the pulse,

(Testimony of Lieutenant Frederick C. Kelly.)
you would still be of your opinion that thrombo angiitis obliterans existed in 1918 and 1919, at the time of his discharge?

A. It was not my contention it existed. I said it was possible, perfectly possible for it to exist.

Q. You said the man was totally and permanently disabled at that time?

The COURT.—No, the point is this. He is taking into consideration what the plaintiff says. If you remember the statement of someone else, that is only a statement.

Mr. WOLLENBERG.—Q. Doctor, you stated in your opinion that the man was totally and permanently disabled in 1918, or 1919 at the time of his discharge from the Marine Corps?

A. I don't know whether I testified that he was permanently disabled in 1918.

Q. Well, I don't know whether you did in 1918, but you did at the time of his discharge, which is my recollection of that, and the time of his discharge was July, 1919.

The COURT.—He so testified, but he said he would have to take the statement of the plaintiff as to the facts as given on the witness stand.

Mr. WOLLENBERG.—Q. Did you express your opinion that he was permanently and totally disabled at that time, did you? [37]

A. Yes.

Q. And would you now express your opinion that he was permanently and totally disabled in July of 1919?

(Testimony of Lieutenant Frederick C. Kelly.)

A. I couldn't tell you that.

Q. Would you say that he was totally and permanently disabled in February of 1920?

A. I would not be any more familiar with the facts in 1918 than in 1920.

Q. So you wouldn't say that he was totally disabled in 1920?

Mr. McNAB.—I submit that that is not proper cross-examination because the question was based upon the testimony of the plaintiff himself.

The COURT.—What do you mean by that? Do you mean that without taking it as true, what the plaintiff testified to, that you wouldn't be able to do it otherwise?

A. May I ask a question?

The COURT.—In other words, in view of the statement of the plaintiff at the present time, and your finding as to his condition, what existed in him, you are not able to place your finger on the time of its beginning, when he was totally and permanently disabled, are you?

A. That is correct.

Q. However, you received the history from the man himself?

A. Yes.

Q. And in this case if you accept the history as given on the witness stand as true, if that history is true, in connection with your own observation, do you feel that he was permanently and totally dis-

(Testimony of Lieutenant Frederick C. Kelly.)

abled at the time he was discharged; you do, don't you?

A. Yes sir. [38]

Q. Is that correct?

A. Yes sir.

Q. Combining the two?

A. Yes.

Q. And as I understand, in answer to Mr. Wollenberg you said, that if you didn't have his history, then you wouldn't know?

A. That is true.

Q. That is what you are testifying to?

A. Yes.

Q. That is what I understood you to say?

A. Yes.

Mr. WOLLENBERG.—Q. Now even taking that history, doctor, isn't it logical for you to assume that he was totally and permanently disabled for the first time in 1927 or 1928?

A. No, I don't think so.

Q. Doctor, what weight did you give in the history to the fact that he had—Mr. McNab mentioned a tonsillectomy and an appendicitis operation; had they any connection with it?

A. Bearing on the condition?

Q. On the condition.

A. None.

Q. No; doctor, you stated that this is a progressive disease, that is correct, isn't it?

A. It is, yes.

(Testimony of Lieutenant Frederick C. Kelly.)

Q. Now a man who has the disease in the first early stages may have a period of remission in which the pain isn't it as great, or intensive, or entirely gone?

A. That is possible.

Q. Now isn't it usual that there are periods of [39] remission?

A. No, I wouldn't say that it is the usual course of the disease, but no two cases of the disease manifest themselves alike, to the exact point.

The usual ages that individuals suffer from the disease are between twenty-five and fifty-five and it attacks suddenly. It is immediately disabling and invariably progressive, and progresses over a period of from ten to twenty years. There may be periods when the disease only manifests itself by an attack on the skin although scars on the skin are usually an indication of an advanced state of the disease not an early state. It is possible to have dermatitis in any skin that is malnourished in the blood.

Q. What is the progress of the present condition, the disease that Mr. Burleyson has, since you have observed him; you have stated that it is progressive, but what degree is it?

A. I will say moderately severe. I would say it is in a moderate state now. The disease may run a course of from five to fifteen years. I did not make a statement to Mr. McNab's question that amputation is perhaps the only thing that medical

(Testimony of Lieutenant Frederick C. Kelly.)

science has in view in this case. That statement is incorrect.

The COURT.—When they had gangrene—the only remedy where there is gangrene?

Mr. WOLLENBERG.—Q. And is that the invariable course in this disease?

A. Untreated, yes.

Mr. Burleyson has been treated at Letterman, according to the hospital records, from March 29, 1929 to June 27, and with no improvement. No I would not say that in view of the treatment Mr. Burleyson has been receiving, gangrene and amputation are the inevitable thing in his case. In comparison with treatment in former years, amputa-

[40]

tion is very remote and under the treatment in present days there is practically no amputation whatever. In my opinion, based on an assumption that the symptoms were Buerger's disease, I would say that a man is not permanently and totally disabled from the inception of the disease. I don't know when the inception of Mr. Burleyson's disease occurred. I have no data to go on as to whether or not Mr. Burleyson had the disease prior to the time he went into the service.

Redirect Examination
by Mr. McNab.

I am unable to detect any pulse in Mr. Burleyson's left extremity. Circulation there from the heart has been interrupted. He has pulse in one

(Testimony of Lieutenant Frederick C. Kelly.)

of the vessels, diminished. In the right extremity in the main vessel it can be felt intermittently but not all of the time, not a steady flow. It would not be possible to diagnose this disease without a test of the pulse. The break in the skin bursting and the continuation of exudes of pus would indicate that the disease was probably very advanced and was caused by trophic lesion, malnutrition. It would indicate a fairly well advanced stage of the disease. He will have to undergo treatment in order to keep himself stationary as he now is at the present time, for the rest of his life. He may undergo the cutting off of certain nerve centers and obtain relief but not a cure. I do not believe his limbs will ever be any better than they are at present. Any kind of work that entails the use of the lower limbs would aggravate the trouble or at least retard possible recovery. Work entailing the use of the legs is detrimental to his health.

Recross Examination
by Mr. Wollenberg. [41]

When I described the pulse, I am referring to my personal examination of him. I took his pulse on January 8 of this year. I know nothing at all of his pulse in 1928 or 1919. I know nothing of the pulse condition between 1919 and January of 1932 personally, but I know what it was in 1929 from the records at Letterman Hospital. I do not know

(Testimony of Lieutenant Frederick C. Kelly.)
anything prior to his first admission into Letterman Hospital.

TESTIMONY OF DR. WILLIAM COOPER EIDENMULLER,

called on behalf of plaintiff and sworn.

(By Mr. McNab.)

I am a physician and surgeon practicing in this city. I received my medical training at the University of California. I have been practicing in San Francisco a little over twenty-five years.

Sidney Burleyson first came under my observation in the early part of 1927 and has continued under my observation down to this date. The first time I became acquainted with him I called at the Hotel Worth, 641 Post Street, when I was attending professionally a case for the hotel. I observed him many times. Every evening he would be back of the counter reclining in one chair with his feet and legs up on another, sometimes wrapped in a blanket. His limbs would be up and he would have thick woolen stocking and slippers on. Periodically since that time he has been under my observation and care. I made a diagnosis of the disease with which he is afflicted and determined it to be thrombo angiitis obliterans, otherwise known as Buerger's disease. I will describe this disease as follows: all the parts of our body live by virtue of

(Testimony of Dr. William Cooper Eidenmuller.)
the fact that they get a certain amount of nutrition that is carried to the various parts of the body through the arteries, in the form of nutriment and water and oxygen. The vessels that carry the pure blood to [42] the legs, in this case, in a case of this kind—they became more or less obstructed. Mr. Burleyson at times, when his feet have been depending too long, became reddish and bluish, owing to the fact that his blood is getting into the arteries and can not get back through the veins. Now we know that if, over a long period of time it is determined that blood can get into the feet and lower extremities when depending, and not get out, that means that there is more or less obstruction in the veins; the blood gets in but not back. Now from study or observation, when his feet and legs are on the horizontal, or up above the horizontal, the feet and legs get white, and they stay so, and the normal color doesn't return as long as they are in that position. When that occurs, time after time, it means that there is some organic physical obstruction to the flow of the arterial blood into the arteries that feed the legs. In that case the blood ran out of the legs when the legs are horizontal or above, and can not run in through the arteries, which means that there is, when it occurs, time and time again, after repeated examinations, that there is a definite physical organic obstruction in the arteries. So in Mr. Burleyson's case, on repeated

(Testimony of Dr. William Cooper Eidenmuller.)
examinations, I satisfied myself that there was an organic obstruction to the flow of blood in the outer arteries and veins to both legs, and owing to the fact that when the legs are depending that the blood can not get out, and, when the legs are raised, the blood can not get in, and owing to the fact that in normal feet and legs, we should ordinarily feel three arterial pulses in each foot and each leg, but in the case of Mr. Burleyson, I have never been able at one time to feel more than one pulse in either leg, in all the examinations I have made of him since 1927, and in my more recent examinations I have not been able to feel any pulse in the left leg, and very poor pulse in the right leg just below the ankle; those findings along with the [43] history that if there is a certain limited amount of exercise that cramp-like pains are induced, and weakness in the leg develops, that causes him to cease walking and sit down, and cease standing, those are the main points that caused me to diagnose his case as thrombo angiitas obliterans. There was evidence of organic obstruction of the arteries and veins of the legs and a great diminution of the arterial pulse in each leg; an absence in the left and almost a complete absence in the right, along with a history of pain on raising them too long, when the feet are white, elevated to the horizontal or above, and when he exercises even a very limited amount he gets pain, those symptoms are characteristic signs of

(Testimony of Dr. William Cooper Eidenmuller.)
thrombo angiitas obliterans and nothing else in medicine, if you can rule out heart disease and kidney disease, conditions which might give swelling and pain and dropsy—if you rule out those conditions, as I have, why the diagnosis of thrombo angiitas obliterans can stand and must stand unqualified. It is a comparatively rare disease among human beings. There is no known treatment or cure for it. Standing on the feet for a prolonged time produces weakness and pain which causes the patient to cease standing on his feet and cease walking. For a certain limited time there is an improvement over his previous posture if he had been lying or sitting down. It helps for a while. The change in posture limits the circulation for a time and for that reason it is beneficial, in fact the postural exercises that Dr. Buerger recommends are carried on with the idea of temporarily increasing the amount of blood in the collateral surfaces with the idea of producing a better function. In this condition, where the legs are involved, standing for a long period of time makes them become pink and red and cramps appear in the legs and he would have to recline and elevate his legs and soak them in hot [44] water. It is a progressive disease. In the normal course it progresses beyond the point where it is and may continue that way, but in that event it would mean continued life of mental suffering and physical disability. On the other hand

(Testimony of Dr. William Cooper Eidenmuller.)
there might come a time not far off, or further off, I hope, when it does come, when nature will not be able to supply enough blood through the collateral vessels for the feet and legs to live, in which event they will die, and when those parts die suddenly—we speak of that as gangrene, and when that takes place—when the limbs are alive they must have nutrition to live on, but such a condition as this can extend and continue, but if it reaches this stage and results in general infection, amputation, of course, in such instances is required. Up to several years ago from seventy-five to eighty-five per cent, roughly, came to amputation in from five to fifteen years, but modern lines of treatment have been able to prolong the incident of such an ending.

In my opinion, Mr. Burleyson's case as it stands today is about twelve years old. I am not able to state at this time whether amputation will be necessary or not in his case but it is my opinion, from my observation of the case from the spring of 1927 and continuing on during each year up to January 11, 1932, noting the progress and the conditions during these years, that amputation will probably become necessary at some future time. It has become progressively worse over this period of time and in the majority of cases it progresses and becomes worse. There is no cure known either to medical or surgical science. I have familiarized myself with the history of the case and the symp-

(Testimony of Dr. William Cooper Eidenmuller.)

toms from the beginning, as related to me by the plaintiff, and I am familiar with the discharge from the naval service. In my opinion he was afflicted with the disease [45] while he was still in the service of the United States. I know the definition of permanent and total disability as stated in the Veterans Statute, and in my opinion, from the history of the case as I have learned it, he was permanently and totally disabled during the time he was in the naval forces of the United States and up to the present time, and he was totally and permanently disabled before he was discharged and has continued so up to the present time.

Cross-examination
by Mr. Wollenberg.

In my opinion he was totally and permanently disabled, for the best interests of his limbs and his life, under the definition, during the time that he earned $100 a month and found, at Tracy, from the Southern Pacific and also during the time that he continued in the work at Mare Island when he first came out of the service in 1919 and 1920, that is from the standpoint of his best interests and his life, he was totally and permanently disabled, and that would be my answer for the entire period of time up to 1926, over all the period of his employment. I do not believe that he wouldn't be in the condition that he is today if he had not worked, but

(Testimony of Dr. William Cooper Eidenmuller.)
I believe that he was running a risk of jeopardizing his limbs and his life by work at any time. I can not say that if he had taken proper treatment he would be in different shape than he is now but he was taking a risk that wouldn't be advisable and no medical advisor should have advised him to work since his discharge. I do not know from my experience whether he would be in a different condition today. I have an opinion in my mind as to when the disease of thrombo angiitis obliterans actually commenced in this case, but of course it is only relative and only a degree. The more we go into these things the more we realize [46] how little we know, but still going as far as we humanly can, I am willing to state that in my opinion the trouble began from the time, or after the time he was discharged from the government in 1919, after having had two operations, the tonsillectony and appendicitis, and having had influenza. The only weight I can give the appendicitis operation is from a chronological standpoint. He gave me a history that a few days, perhaps weeks, after being discharged from the government hospital for influenza, for tonsilitis and for appendicitis and following an operation for removal of his tonsils and appendix, he was first put to doing light work, which wasn't so light, as he said, then he was returned to heavy duty, regular duty, drilling, etc. Shortly after that his legs started swelling from the knees down, that

(Testimony of Dr. William Cooper Eidenmuller.)
is the swelling, and his arches here and his ankles. He had severe pain in his limbs. The swelling was growing and the swelling was so great he couldn't see his ankles at times. I believe he became disabled at that time. Now I take it that those symptoms, so far as we are able to tell in this case, were the beginning symptoms and signs of this thrombo angiitis obliterans. I did not give any particular weight to the tonsil operation except that conditions arose shortly after the infections and those operations, just a chronological connection. I have no ways of weighing it, and nobody has, of directly connecting up the thrombo angiitas obliterans with any infection or operation.

I have taken the life history of Mr. Burleyson and in my opinion the first part of the history can be connected up with the condition, and I therefore think that it commenced about that time. I therefore believe that the thrombo angiitas obliterans commenced about the time of the appen- [47] dicitis and I have so testified. I have spoken about the percentages of amputations in cases of this kind. They are the old percentages but our present day opinion is still in the molding. It is possible, with our further advanced knowledge today, that more physicians have become thrombo angiitas obliterans minded and we are discovering our cases earlier, and for that reason they naturally would have an entirely different course to run, but we can not

(Testimony of Dr. William Cooper Eidenmuller.)

attribute too much to our modern intensive treatment, time alone will tell. Our treatments haven't been going on long enough to say that amputations are not the thing. The treatment has only been carried on for the last five or ten years. I have no recollection of the case in 1920 except from the history. I believe that the condition was sufficiently advanced for him to be totally physically disabled.

Redirect Examination
by Mr. McNab.

Even if amputation should not prove necessary, we are doing things that we think and hope might improve his present condition, but there is no guarantee that they will. I do not think that he will ever recover the use of his limbs. The work he has done may have aggravated the condition and it might not have. I do know the work that he did during 1927 when under my observation was against my advice. I advised against it on general principles. Of course at that time he had thropic lesions, two gangrenous ulcers of his toes. He had fallen several times and the blood supply in his limbs was so little that he fell down several times. Thropic lesions is a small degree of gangrene. If the ulcer had been bursted, the leg would have gone into gangrene. The falling was caused apparently by the blood supply. I have examined him before and after these falls at [48] several times and I

(Testimony of Dr. William Cooper Eidenmuller.)
advised him to take sunshine and fresh air. Those things are considered beneficial for the health. He was working nights and sleeping days. When he went to Heald's he said he was all right, and the first thing he knew he was on his feet, and when he was home he was inside on his feet, but there was no other condition in his body that I could find to attribute it to, and I came to the conclusion that the blood supply in his limbs had been cut off and there was nothing to hold him up and he collapsed as a paralytic would. There is a lack of blood. There is a minimum of blood required to function and when your limbs get below that limit, your legs give out, as in paralysis. I don't know where he was or discharged from what hospital that indicates these things to me, but he was in the hospital for six weeks, sometime before he was discharged, while still in the forces.

Recross Examination
by Mr. Wollenberg.

All I have are these notes, or history, that I have taken in the case. You may see them. These do not consist of my notes of the life history of this patient. I haven't all of my notes at this time. The original notes have been gone over and from them I have made a synopsis, but these represent all I have. I can not tell when I made this memorandum. I couldn't say whether it was in 1927.

(Testimony of Dr. William Cooper Eidenmuller.)
There is no date on it. This page is a copy of my ledger sheet recently taken out of the ledger, which is to acquaint myself with the chief dates. There is nothing on either that shows my statement of the history of the case and my diagnosis. It just shows some of the dates I saw him and the charges marked against it. This sheet shows symptoms that I found from time to time. These are some questions I asked [49] him in relation to the case and the answers that I recorded—"causes of the disease," "racial, Hebrew, over forty," "tobacco, most important factor. Syphilis. Alcohol." I did not find that Mr. Burleyson was racially a Hebrew over forty. I went into the question of races, life history, family, former use of alcohol, tobacco, exposure to cold, where he lived, and race. He told me during the time that I knew him, and that I observed him, that he had been smoking cigars. I considered all the important things. He didn't give a history or have sufficient attributes to have any effect on the case. The history, as far as alcohol was concerned, was very moderate. As to syphilis, several Wassermans were taken in the service and all were negative. I examined him and found no evidence of syphilis. I examined him to find evidence of gonorrhea. I did not find an "unstable hyper-sensitive nervous system." I did not find that his mode and place of living had anything to do with his condition. I learned from him that his

(Testimony of Dr. William Cooper Eidenmuller.)

earlier life at home on the farm was a healthy life. Of course the climate was occasionally extreme. There were some physical hardships connected with his former life during service in the government which might have some mental or physical hardships connected with it. I have testified that he developed thrombo angiitis obliterans while in the service.

Q. Yes, but I am talking about your notes here in connection with that, under those various designations that I have been reading to you.

A. I understand. There is nothing that I know of, that he did in the government service at all. Long exposure to the cold is a condition and factor and cause. In his early life he was subject to considerable cold, according to the history given to me, this was on the farm in the winter time, but it didn't seem to me to be remarkable enough to be [50] connected with the condition. I did find something of outside causes, but as to underlying fundamental causes, I can describe nothing remarkable. This letter dated November 21, 1931, addressed to Attorney John McNab, states that a re-examination was made on September 24 and November 21, 1931, based on previous findings, and is a report to Mr. McNab in connection with the case. I don't know whether or not it is a general discussion of the disease. It states that this is a progressive disease and that another disease like it is Raynaud's

(Testimony of Dr. William Cooper Eidenmuller.)
disease. I was trying to explain to Mr. McNab why I believed it was emphatically thrombo angiitis obliterans. I took the pulse of the feet in this case. I would have been skeptical in making a diagnosis if I found all the pulses normal, but in this case I have only been able to find a poor weak pulse in the left foot and at times I didn't find any in the right foot and lower leg. I thought I felt a fair pulse on one occasion. Each leg has three arterial fronts and that would give three pulses, but in Mr. Burleyson's foot at times I haven't been able to find any, and at other times I have been able to find one weak pulse, in the right foot more often I have thought I felt one really weak pulse out of the three pulses. 1927 is the first time I examined Mr. Burleyson. This was the first time that I was called to his house. I examined him earlier than that. I called to see him, I was calling at the hotel at that time treating a guest and their employes. At that time I happened to be treating an employe at the hotel who had Raynaud's disease and for that reason Mr. Burleyson's case had a great interest for me, but that man has since lost both of his legs because of that disease, and because of that disease in contacting the two diseases I went deeply into Mr. Burleyson's case.

SIDNEY T. BURLEYSON,

recalled on behalf of plaintiff.

Examination
by Mr. McNab. [51]

After my discharge I continued to pay premiums on my war risk insurance policy for about seven months after my discharge. (Stipulated that the policy of war risk insurance was in force until March 1, 1920.)

By stipulation the testimony of

HARRY A. PESCHON,

a witness at a former trial, was read on behalf of the plaintiff.

I am a police officer connected with the detective bureau in the city, in the identification bureau. I know the plaintiff, Mr. Burleyson. I saw him in Ward 4 at the Diagnostic Center of the Base Hospital at Palo Alto. I knew him to be there during the time that I was there, from the first week in January of this year to the middle of February. He was still an occupant of the hospital at the time I left; he was a bed patient. I don't know just what the doctors were doing with him, but I do know that both of his legs were in a plaster cast the entire time with the exception of the last week that I was there. He was in a surgical bed so that part of his body could be raised and his feet were

(Testimony of Harry A. Peschon.)

elevated. They were both in a plaster cast. He did not say that he was in pain but he stayed right in bed all the time that I was there.

Mr. WOLLENBERG.—This is cross-examination:

He did not tell me what he was there for or what he was being treated for.

By stipulation the testimony of

G. H. SIMPSON,

a witness on behalf of the plaintiff, was read.

I am an engineer, railroad construction. I know the plaintiff Sidney Burleyson; I have known him for two and a half or three years. When I first knew him, he was night clerk at the Hotel Worth. I had occasion to observe him while he was attending to his duties there; it was during the night time. He kept off his feet as much as he could. He [52] served from eleven at night until seven in the morning. During that period of time there were very few people coming and going. I did not observe his general condition with regard to his ability to get around at first, but I did so later on. I noticed he had difficulty in walking around. At that time he was not using crutches. He seemed to walk as if his feet hurt him. He did not impress me as a man who was able to carry on any continuous work.

(Testimony of G. H. Simpson.)

Cross-examination
by Mr. Wollenberg.

I have not any idea how many hours a night he would work on that job. I was not working with him. I came in early in the morning and noticed him sitting in a chair with his feet propped up. I found out later the cause of it; it was due to trouble with his feet. I noticed that his arches had fallen. I looked at his feet. He had on a pair of Oxfords. From the appearance down here (illustrating) it looked as though the arches had fallen. I presume he was on the job about a year. I know he was on from eleven at night to seven in the morning. So far as I know he performed no work during the day time.

By stipulation the testimony of

F. W. SMITH,

a witness called on behalf of plaintiff, was read.

I am proprietor of the Herald Hotel. Part of the time for the last eighteen months off and on Mr. Burleyson lived at my hotel. During that time I gave him no employment whatever. During the time that he has been at the hotel I have had occasion to observe his condition. When he first came to the hotel, I think about May of last year, he was having trouble with his feet and was using a cane, and

(Testimony of F. W. Smith.)

after he was there about two months he went down to the Palo Alto Veterans' Hospital. I know of my own knowledge that he had [53] gone to the base hospital at Palo Alto. His condition was much worse when he returned. My recollection is that he came back to the city after about 25 days or so, and then he went to the hospital again and stayed down there for some considerable time, I think. I don't remember the exact date, but four or five months; and when he came back he was much worse; he was on crutches. We naturally noticed that when he came back he was around the hotel and could hardly walk; he just used these crutches. He could not hold one position very long; we never said anything to him, but he would sit down for about half an hour, and then he would get up and walk some place else, or go to his room, but he seemed to be much worse when he came back from the hospital. During the time that I observed him he was not performing any labor of any kind whatever. He did not during any of the time he was there perform any labor, or do anything other than care for himself.

Cross-examination
by Mr. Wollenberg.

He was a roomer at my hotel. He first came there in May of last year and stayed until some time in July, and then went to the hospital for, I think about twenty days or so, and then he came back and

(Testimony of F. W. Smith.)

stayed for a short time, and then went down to Palo Alto and stayed down there I think four or five months, and then came back to the hotel for a short time and went out to the Letterman Hospital. I was in touch with Mr. Burleyson while he was in the hospital; I was forwarding mail to him and telephoning him. I met him for the first time in May of last year, I think.

(Physical examination report of Sidney Burleyson conducted by Major Mariella of the Letterman Hospital, bearing date March 29, 1929, also diagnosis of Dr. M. T. Maynard of the Veterans Bureau, which was admitted by the court and read in evidence, attached hereto.) [54]

DR. MARIELLA'S REPORT OF PHYSICAL EXAMINATION OF PLAINTIFF.

"June 15, 1929.

Physical examination of this patient shows the following: Tonsils are out; throat in good condition. Teeth in good shape. No adenopathy; no arterio-sclerosis. Thyroid negative. No hernia, varicocele or varicose veins. Slight atrophy right testicle following mumps in 1917. Skin clear and healthy except for a few pigmented moles. Pupils equal, regular and react normally, no tremor; abdominal, cremasteric, and plantar reflexes normal;

deep reflexes normal. Heart, lungs and abdomen negative. Blood pressure 126 over 90. Radial and brachial pulses (pulsation) is good and the hands are warm and moist. The feet are cold and the legs are cool up to the knees, more marked on the left. The feet show a rather marked cyanosis in the dependent position, the discoloration grading off to the mid leg; upon elevation of the leg pallor is noted about one and one-half minutes. Posterial tibial pulse is present, but definitely weak, bilateral. The dorsalis pedis pulse is absent bilaterally. There is a third degree flat feet bilateral. No atrophic changes are noted at this time. There is no history of a previous phlebitis. Slight oedema of the feet and ankles is present and there is a history of such oedema for several years back. This patient has had pain in his feet and ankles for the past eight or ten years. This has been attributed to the marked pes planus, but it wasn't until some time later that the symptoms of circulatory disturbance became noticeable: actually he dates the coldness and color changes of the feet and legs back to a little over a year ago. He has never noted claudication, but has been on his feet very little for the past two years. He states that there is a dull ache [55] present at times in the legs, but nothing severe. Has never used tobacco excessively, but still continues to use it moderately in spite of advice to the contrary. I saw this patient about the middle of April, 1929, and at that time diagnosed him as a case of

thrombo angiitis obliterans; I am still of the same opinion. He has been in hospitals now for two and a half months and has received all the usual procedure for Buerger's disease (contrast baths, postural exercises, rest, typhoid vaccine intravenously, physio-therapy, protection of the extremities from cold, and so forth). Only slight improvement has resulted. He is desirous of leaving the hospital for a time and states that he can continue the contrast baths and exercises at his home. Under the circumstances would recommend his discharge as a hospital maximum, hospital benefit case, with the understanding that he is to report to some hospital later for continuation of the other forms of treatment. No treatment for the pes planus is indicated at this time in view of the circulatory disturbance. All foci of infection present have been removed. I. N. Mariella." [56]

Mr. McNAB.—We rest.

By stipulation the testimony of

J. A. BROOKS,

a witness on behalf of the plaintiff, was read.

I am a cigar clerk. I live at 154 Ellis Street. I know the plaintiff, Sidney Burleyson, and have known him for about seven years. I have had occasion to observe his habits, they are regular; he does not use anything that would disturb his sys-

(Testimony of J. A. Brooks.)

tem. I have had occasion to observe the development of his trouble. He seems to suffer pain; he is getting worse, I believe. I have seen him before and after his visits to the various hospitals which have been described here. Before his visits to the hospitals at Letterman and Palo Alto. After his return from those hospitals there did not seem to be any improvement in his condition. He seems to suffer pain. During the time I have observed him he seems to be taking the best of care of himself, resting all that he could. I believe it has been about a year and a half since he has been engaged in any form of labor. Prior to that time he was never continuously employed at anything, to my knowledge.

Mr. WOLLENBERG.—This is cross-examination.

I reside in San Francisco and I have during the seven years that I have known Mr. Burleyson. I believe that during all of those seven years except the last he has been working outside of San Francisco. During the time he was working outside of San Francisco I did not see him at all.

TESTIMONY OF CHARLES E. WALSH,

called on behalf of defendant.

I am Recorder of the Labor Board and have charge of [57] all the reports of labor at Mare Island. As such I have the original records appertaining to Sidney Burleyson with me and also a photostatic copy of them. He was employed under the rating of rivet heater until August 1, 1919. Then he took his discharge at his own request and was immediately employed as a machinist's helper under the rating of machinist helper, August 1, 1919. Under the rating of rivet heater he was paid $4.20 per day. I can not say what his duties were under that rating but he worked under the rating. Here is a photostatic copy of the muster roll. It only indicates the rating. On August 1, 1919, he went to work under the rating of machinist's helper. He was discharged December 2 of the same year at his own request and then immediately was employed as a clerk on the same day. He took his discharge on June 24, 1920; this was a temporary appointment and the temporary appointment expired June 24, 1920. At this time a regular appointee came through the civil service and Burleyson's term expired. The regular appointee appeared. He had to make way for the regular appointee. That is what the records show. On June 24, 1920, he was employed as a storeman, temporarily. He resigned from that position August 19, 1920. His pay at that time was $3.84 per day

(Testimony of Dr. Charles Ragle.)

as storeman. There isn't anything to show why his labor was terminated on August 19. There is a copy of his resignation here. It doesn't state why. That is all the employment shown at Mare Island. It is necessary for a physical examination to be made on employment. I have a copy of the examination. This first examination was July 14 and the second one a year later, June 20, 1920, made by Dr. Finnegan. You may have these photostatic copies. I will keep the originals here. [58]

Cross-examination
by Mr. McNab.

The fact that he was employed under a rating of riveter does not mean that he actually performed work as a riveter. We had a great many men employed at Mare Island at that time, some we used as clerks and some at light work.

Q. He was merely rated for the purpose of salaries; he may have performed clerical duties.

A. I have no way of telling.

The resignation reads as follows: "Sidney Burleyson. To the Supply Officer, Mare Island. Resignation. I do hereby tender my resignation to become effective at the expiration of my leave of absence, July 22 to August 24, 1920. Respectfully. (Signed) Sidney Burleyson," and that was accepted by the supply officer.

TESTIMONY OF DR. CHARLES RAGLE,

called on behalf of defendant and sworn.

(By Mr. Wollenberg.)

I am a physician with the Navy Department and in July, 1919, I was with the Navy Department at Mare Island. That is my signature on this report. I made an examination of Sidney Burleyson. That was the usual examination prerequisite to civil service employment. I gave him the routine physical examination. I have no independent recollection of this man. I recognize my signature on this examination and I know that the examination is in my handwriting. I made an examination of his feet at that time. He had a moderate amount of flat feet. The examination of the feet consisted of stepping on a white blotter and getting the imprint of the feet on a dry surface and then examining him for the condition of the arches to see whether they had fallen and were lower than normal. I did that in this case and found a moderate amount of flat feet, about one-half [59] drop in the arches

at the time, about one-half an inch drop at that time. I don't remember whether I examined the skin. There was no evidence of gout. That would necessitate an examination of the joints of the feet. He was put through exercises lifting weights and all of those exercises were passed satisfactorily. I can tell from my examination record that he did

(Testimony of Dr. Charles Ragle.)

these things satisfactorily and if there was any deviation from the normal, this examination record would show it. My replies are true from this examination. I found that the applicant had one-half inch flat feet. I required him at that time to raise himself on his toes. At the time I made my examination, July 14, 1919, Sidney Burleyson was not permanently and totally disabled under the definition as follows: "Total disability shall be deemed to be any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, and that condition shall be deemed permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it."

(Examination report received in evidence and marked Defendant's Exhibit No. 1.)

I do not know nor do I recall the plaintiff in this case.

Cross-examination
by Mr. McNab.

I have no recollection incident to the examination of this plaintiff. I was examining on the average of two thousand men a month, and that was working six days a week, something like one hundred men a day. The examinations were pretty thorough. I would say one-half an hour was taken

(Testimony of Dr. Charles Ragle.)

in the examination. Of course I had assistants. We ran them through in groups for the exercises. We stripped them in groups and put them in a room and examined them in flocks. [60] I had two assistants. I called out the answers to be written in the blanks and I read all of the blanks afterwards. This particular blank of Sidney Burleyson is filled out in another handwriting but I called out the answers to be written in. I have no recollection whatever of having seen Sidney Burleyson before and the incident doesn't exist in my mind or whether I put five or fifty minutes on him, I do not recall.

TESTIMONY OF DR. GEORGE J. McCHESNEY,

called on behalf of defendant and sworn.

(By Mr. Wollenberg.)

I am a physician and surgeon licensed to practice in this city. I have been practicing my profession over thirty years and I am a graduate of the University of California. My specialty at present is orthopedics, specialty of the bones and joints and their deformities. I am doing certain work for the United States Veterans Bureau as a consultant and I was doing that work in the year 1928. As such I twice examined Sidney T. Burleyson. I have

(Testimony of Dr. George J. McChesney.)

before me the examination report and results of my examination, one on March 7, 1928, and on October 5, 1928. Those are the only two. There is also one of February 8, 1929. The examination of March 7, 1928, took place in my office at the request of the Veterans Bureau. I was requested to examine his feet. I found he had a moderate severe pes planus or flat feet, with a supplemented skin disease in the nature, as far as I could determine, of dermatitis. I had him do certain exercises with his feet to determine their flexibility and function and strength, etc. I had him rise on his toes, which I found he could do fifty per cent normal. He could rock back on his heels and supernate his feet, or invert his feet, that is, stand on the outer edges of them, fifty per cent normal, which indicated that the flexibility of his ankle and tarsal joint [61] was fifty per cent normal or more, and that the strength of the muscles controlling his feet was also fifty per cent normal. The dermatitis I have mentioned was a chronic dermatitis on the top of the first three toes on the left, and the first two toes on the right. He had to use an ointment and dressing. It looked like ordinary dermatitis. I am not a qualified skin specialist but it looked to me like what is known as athlete's feet. There were no open ulcers. There was some discharge but not a serious discharge, not more than a skin discharge. It did not appear to be a gangrene stage. I had no

(Testimony of Dr. George J. McChesney.)

special recommendation to make for the skin condition other than to continue with the ointment and dressing. I rendered an opinion in connection with the case to the Veterans Bureau. I prescribed alteration in his shoes and certain exercises for his muscles and ligaments, that is all. My next examination was October 5, 1928. That took place in Palo Alto. He was a patient at the diagnostic center at Palo Alto. I found nothing changed so far as his feet were concerned. I tested for circulation of the feet and found no serious interference with the circulation. The physician could have felt the pulse. I felt a pulse in his feet at that time. The vessels were normal. The pulse was normal as I took it at that time. I found that his muscle tone was poor as he wasn't using his muscles and it was my opinion that the exercise and treatment previously recommended would help his muscles and help his condition generally, and hence improve the skin condition, which was still bothering him. My last examination was February 28, 1929. I found on that occasion that the eczema was apparently cured. He was wearing plaster splints to invert the feet and correct the position of the flat feet. He had soreness and weakness in his arch supporting structure. I found [62] nothing changed in his feet. Given a definition of total and permanent disability as "any impairment of mind or body which renders it impossible for the disabled person

(Testimony of Dr. George J. McChesney.)

to follow continuously any substantially gainful occupation'' at the time of my first examination on March 1, 1928, I would not consider he was totally disabled at that time, nor at any of my subsequent examinations did I consider him totally disabled.

Cross-examination
by Mr. McNab.

I considered that he had weak feet and they were to a certain extent painful. He was incapacitated for work that would require him to be on his feet all day or do much walking; work that wouldn't require him to be on his feet but part of the time he could do. Any clerical occupation, as far as his feet were concerned he could do. I mean that his feet wouldn't prevent him from accepting a clerical occupation if he were sufficiently qualified mentally to take care of that position. I don't know anything about his mental equipment. I am merely stating that if he were equipped for a particular clerical position which would keep him off his feet, he could occupy that kind of a position. He would have to be off his feet I estimate approximately half of the time. I only know about his trouble with his feet. I made no examination into his qualification to occupy clerical positions. I have diagnosed cases of thrombo angiitis obliterans. I have seen filteen or twenty of them. I do not know Dr. Kelly of Letterman Hospital. If Dr. Kelly, a surgeon at Letter-

(Testimony of Dr. George J. McChesney.)

man Hospital should have testified that he has for some time past during the period of his care of Mr. Burleyson, been a victim of thrombo angiitis obliterans, that would not affect my diagnosis in the case and it does not [63] alter my opinion. He had flat feet and a skin eruption around the toe. He had a purulent discharge, this discharge, as one sees in eczema, very mildly infectious. Infection might be obtained from contact with it. I only saw the ointment he had on his feet. I don't know who prescribed it for him. I did not diagnose the trouble with his feet as thrombo angiitis obliterans. I recommended exercise for his muscles and alteration in his shoes. The exercise that I recommended would have no influence on the disease of thrmobo angiitis obliterans, or if any influence, a beneficial one. I prescribed the exercises of raising up on the toes, inverting the feet, and exercises which he could easily do while standing, that would not have a tendency to be painful. At the time I examined him, exercises could not have aggravated any disease that he had. On my last examination of him at Palo Alto Hospital, he had a plaster cast on both limbs to the knee, completely covering his feet with the exception of the toes projecting. I have no statement that I examined him with or without this plaster cast on at this last examination. I only recall what my notes indicate. I have no indication that this cast was ever cut off to relieve

(Testimony of Dr. George J. McChesney.)
spasms of pain. The condition of his feet was practically unchanged from the time of my first examination of March 7, 1928, to my final examination of 1929, it was no better.

Redirect Examination
by Mr. Wollenberg.

When I stated that this man could follow a clerical occupation, I referred to an occupation to which he was suited, and I had in mind that he had been following a clerical occupation from 1919 through to 1927, as well as being a cashier in a railroad eating house and had followed that type of occupation, that is the type that I have in mind, and he could have followed that occupation at the time of my [64] examination of him.

TESTIMONY OF P. J. MANGIN,

by stipulation, a witness called on behalf of the defendant, was read.

I am the examining physician for the Southern Pacific Railroad Company. Referring to the document which you show me, that is a photostatic copy of my signature. That is a photostatic copy of my signature. That is a copy of my signature to a copy of a report of a physical examination made by me of Sidney T. Burleyson. The date of that

(Testimony of P. J. Mangin.)

examination was July 6th, 1926. Upon that examination I found that the heart and lungs are normal. In answer to the question of whether he had been injured and hurt, the reply was negative. In answer to the question of what illness he might have had, he said he had pneumonia, measles, mumps, and appendicitis in 1920. That is the entire history of his condition at that time. He was rejected on that occasion for employment by the Southern Pacific Company. This was an inflammation of the urethral orifice. There was a discharge of the urethra; I was not able to make any positive diagnosis, so I asked him to return in a few days, which would enable me to determine whether it was a simple affair, or not. He did not return, and consequently, his application was rejected. The reason he was rejected was because he failed to return. Basing my opinion upon the record which I have just referred to, bearing in mind this definition of total and permanent, as that disability which would prevent a man from following continuously any substantially gainful occupation, there was nothing that would have prevented me from accepting him at that time.

Cross-examination
by Mr. Wright.

This examination probably consumed about fifteen minutes. I presume he was there looking for

(Testimony of P. J. Mangin.)

a job, trying to get employment. It was not [65] the purpose that he call my attention to defects or troubles. Whatever I found out in the way of troubles I found by extracting from him or by making a physical examination. I did not make any special examination of his feet. There was no examination made of his feet. It was generally restricted to his heart, lungs, the most important elements for the form of employment which our company might take him. Of course his gait was noticeable when he walked in the room, but there was nothing to call my attention to any defect in his limbs in that way. He was not looking for a job from me but that was his purpose in being examined, he was an applicant for employment by the railroad. I have never seen him since. I do not know a thing about his condition at the present time.

TESTIMONY OF GEORGE R. CARSON,

a witness on behalf of defendant, by stipulation, was read.

The photostatic copy of the report you show me, that is my signature upon it. That is a report technically called by my company "physical test record," upon the occasion of the application of Sidney T. Burleyson for employment and it indicates that I made a physical examination of him on August

(Testimony of George R. Carson.)

23rd, 1920. He was applying for a position as cashier. I made a physical examination of him at that time. I examined the sight, first, which was found normal, and then we made a physical examination; it is rather a test, a kind of an inspection, we take the pulse and then we ask him questions about his past sickness. We invariably ask "what past sicknesses have you had, or disabilities?"—so that we can record them here. You see here, he says appendicitis, and tonsils removed. There is nothing said here with reference to his feet. We ask that question, has he any present form of disability to hands, arms, feet or legs? On the question as to his feet, I don't know that he gave me the answer "No." I [66] put "No." He was present at the time and I was examining him at the time.

Cross-examination
by Mr. Wright.

He did not read that detailed document. This examination is rather an inspection, it is not an intensive examination. It required just a few minutes. It is quite different from the examination which I would accord to a patient coming to me so as to be informed as to the condition of his health. There are no blood tests or minute examinations. He was not stripped, we make a practice of raising the clothes and lowering the pants. He was there

(Testimony of George R. Carson.)

for the purpose of being inspected, because he was an applicant for some kind of employment. He was not there complaining of trouble.

Mr. WOLLENBERG.—This is

Redirect Examination.

I did not hear the definition given here of permanent total disability. Assuming this definition to total and permanent disability as a condition where a man can not follow continuously any substantially gainful occupation, in my opinion he was able to perform different duties at that time; I accepted him for the position; otherwise I would not have accepted him. Oh, yes, he must have walked into my office.

Recross Examination
by Mr. Wright.

I never was advised that later, after being employed, he was compelled to discontinue his duties because he was unable to remain on his feet. I don't even know he was employed.

TESTIMONY OF E. E. RYDER,

a witness on behalf of defendant, was read by stipulation.

I am chief clerk, manager of dining car department, Southern Pacific Company. In that capacity I have charge of the personnel records of the employes in that department. I know Mr. Burleyson, the plaintiff in this case. I have a [67] record of his employment by the Southern Pacific Company between 1920 and 1923. He was first employed on August 25, 1920, as cashier, and retired on September 6, 1920, reemployed September 14, 1920, and granted a leave of absence on June 22nd, 1921; he was reemployed on August 16, 1922, and released on November 1st, 1922, and returned to duty on November 19, 1922, granted leave of absence February 16, 1923, returned to duty on March 8, 1923, laid off on May 20, 1923, and returned on June 3, 1923, and finally resigned on September 2, 1923. The first employment began on August 25, 1920, as cashier. That continued until June 22, 1921. The first job was about eleven days. This is a record of the Southern Pacific dining car and hotel service. It is made under my supervision. There were several different reasons given by the plaintiff for discontinuing that work; the first time he left the job was because it was a temporary position; the second time he said that the weather was too hot, and he wished to be transferred to a cooler place; the third time it was another temporary position; the next

(Testimony of E. E. Ryder.)
time he had to go to the hospital for an operation on his eye; the next time it was a temporary position. The last time was because the country was too hot, and he was tired. The records do not show the amount of salary he was paid during that entire employment. The record does indicate how many days he spent upon these different jobs. The days of service are just as I have given them, I do not have the exact days. The service is intermittent, in and out, as he moved from one place to another, and laid off, and returned to duty. The only leave of absence indicated by the record by reason of illness is the eye operation that I have given.

Cross-examination
by Mr. Wright.

I don't know anything about the causes of his laying off and leaves of [68] absence except what was reported to me. I did not talk to Mr. Burleyson himself about it, personally. As far as I know he might have laid off because of pain in his feet or because of some other trouble. I am merely testifying from an official record that was handed to me by some of my subordinates. It does not disclose an unusual number of absences and leaves of absence during employment, only once of his own accord. They were all short periods between reemployment, with one exception. I have given them to you.

(Testimony of E. E. Ryder.)

Redirect Examination
by Mr. Wollenberg.

To a considerable extent those positions in their very nature, are temporary; we move them from one point to another as they may be required.

TESTIMONY OF MISS M. GOUGH,

witness on behalf of defendant, was read by stipulation.

I am in charge of the personal records of the Emporium in this city. I have those records with me; I have the personal record of Mr. Sidney Burleyson, covering his employment during 1923 and 1924. His first employment by the Emporium was on September 21st, 1923. The Emporium requires a physical examination before they go on what we call our regular roll. Mr. Burleyson was on our regular roll. He was a clerk in our receiving room. At that time he was on at $80 a month, but later his salary was $85. So far as I know he worked continuously in that position. The entire extent of his employment was from September 21st, 1923, until May 16th, 1924.

Cross-Examination
by Mr. Wright.

There are no absences recorded. I don't know what hours he kept. I don't know anything about

(Testimony of Miss M. Gough.)
his physical condition when he was there. I don't know whether he was suffering or not. There would be a notation of it if he asked for leave of absence, and we [69] have not any. I am merely testifying from records in my office. They show that his employment terminated on May 16, 1924. He resigned for a better position. I don't know where he went, or what position he went to. According to him, it was a better position. I am only talking from the records. I don't know as a matter of fact that he went to any employment, but he resigned to go.

Redirect Examination
by Mr. Wollenberg.

My records show, though, that it was a better position.

TESTIMONY OF A. L. LESSMAN,

a witness on behalf of defendant, was read by stipulation.

I am director of Heald's Business College. I do not personally have charge of the attendance records of students at Heald's College, but they are kept under my supervision. I have a record of S. Burleyson. I do not know if that is the plaintiff in this case.

Mr. McNAB.—What was the period of time that you claim he was there?

(Testimony of A. L. Lessman.)

Mr. VAN DER ZEE.—January 23 to May 17, 1924.

Mr. McNAB.—He says he went to Heald's during that time.

Mr. VAN DER ZEE.—Will you just state the attendance records of S. Burleyson, the plaintiff in this case, during that time?

A. Well, he was regular in his attendance in the evening school. He missed six sessions of school all together, during that period.

Cross-examination
by Mr. Wright.

He was there from January 23 to May 17, something less than four months, he went three times a week, I am quite sure of that. He went Monday, Wednesday and Friday. In that period of something less than four months he was absent for six sessions, I don't know for what reason. I did not observe him in the [70] school room particularly. Most of our students are seated. All of their studies are conducted there, seated either on a chair or a stool.

TESTIMONY OF JOHN STEVENS,

a witness on behalf of defendant, was read by stipulation.

I am an accountant at Tahoe Tavern. I was at that position in July, 1926. I know the plaintiff, Sidney T. Burleyson; he was employed at Tahoe Tavern from June, continuously for about three months; he worked continuously and his work was entirely satisfactory. His salary was $125 a month and found. He was what you might call a front desk clerk; by that I mean that he passed keys out, sorted mail, and gave general information at the desk. I observed him practically daily during the time of that employment; he never complained to me of any disability or pain or made any complaint about his feet.

Cross-examination
by Mr. Wright.

Dr. Guy Wallace was the house physician at the hotel there; this was in June, 1926, June to October, 1926. To my knowledge Dr. Wallace did not examine him while he was there; I don't know whether he did or not.

Mr. McNAB.—You don't know whether Dr. Wallace made a report to the government as to his feet, do you?

Mr. VAN DER ZEE.—I object to that as not proper cross-examination. There is no ruling.

(Testimony of John Stevens.)

Mr. McNAB.—Do you know whether Dr. Guy Wallace conducted an examination there with respect to his feet?

Mr. VAN DER ZEE.—The same objection.

The COURT.—The objection will be overruled.

Mr. WOLLENBERG.—In this record, and this is one of the points taken upon appeal, it was asked the witness, an accountant at Tahoe, whether he knew that a doctor made an [71] examination on the feet of this man while he was there.

The COURT.—Well, he might have been present and seen it.

Mr. WOLLENBERG.—No, made the examination, conducted the examination relative to his feet. Now the answer indicates that the——

Mr. McNAB.—You are asking him if, while he was performing the duties, that this man was under the care of the attending physician at Tahoe Tavern. We put the doctor on the stand to prove it.

Mr. WOLLENBERG.—I withdraw the objection.

Mr. WRIGHT.—Do you know whether Dr. Guy Wallace conducted an examination there with respect to his feet?

Mr. VAN DER ZEE.—The same objection.

The COURT.—The objection will be overruled.

Mr. VAN DER ZEE.—Exception.

The WITNESS.—If he had made any examination for our insurance it would have come to my

(Testimony of John Stevens.)

hands and I received no such report. I don't know whether or not Dr. Wallace made a physical examination of him. Dr. Wallace was stationed there at the hotel, and if there were any illness in the house it was his business to make examination.

Mr. McNAB.—I would like to offer in evidence from the government's files the two examinations by Dr. Wallace of this man.

Mr. VAN DER ZEE.—No. *object.*

(Two examinations of Dr. Wallace attached hereto.)

DR. GUY WALLACE'S REPORT OF PHYSICAL EXAMINATION OF PLAINTIFF.

I am a practicing physician in the State of California. After his discharge from the military service on July 10th, 1919, I examined the claimant on July 20th, 1926. His complaint at that time was pain and swelling both feet, due to fallen arches—with chronic eczema region of toes. Upon physical examination I found the following symptoms present: Marked displacement of arches. Moderate swelling of tissue around both feet and ankles. Eczema between toes with swelling. I diagnosed the injury of plaintiff as fallen arches and chronic eczema. The prognosis was bad. I do believe the claimant's disability is attributable to his military service, for the following reasons: Claimant informs me that during his service he was operated

for appendicitis and diseased tonsils. He resumed duty while in a weakened condition. Injury to feet no doubt due to marching and other duties. Claimant continued under my care until October 12th, 1926, during which time I treated him as follows: Bathing feet in hot magnesium sulphate solution. Ointment for eczema. Bandaging and so forth, and also gave instructions to patient to remain off feet as much as possible. Remarks, treatment on following days: July 20, 23, 25, August 1st, 7, 9, 18, 26, 31, September 9, 16, 24 and 30, October 8. Fifteen treatments at $2, total $30. Paid to me by claimant. Guy Wallace, M. D." [73]

DR. FREDERICK KELLY,

a witness on behalf of plaintiff, recalled. (Examination by Mr. McNab.)

Pursuant to process of court I have appeared with the Letterman General Hospital records pertaining to Sidney Burleyson. It is one of the original files of the Letterman Hospital and must be returned. I have been instructed to [72] return it to the hospital when I return. It is a signed report of Dr. Mariella and reads as follows:

"June 15, 1929. Physical examination of this patient shows the following: Tonsils are out; throat in good condition. Teeth in good shape. No adenopathy; no arteriosclerosis. Thyroid negative. No

(Testimony of Dr. Frederick Kelly.)
hernia, varicocele or varicose veins. Slight atrophy right testicle following mumps in 1917. Skin clear and healthy except for a few pigmented moles. Pupils equal, regular, and react normally, no tremor, abdominal, cremasteric, and plantar reflexes normal; deep reflexes normal. Heart, lungs and abdomen negative. Blood pressure 126 over 90. Radial and brachial pulses (pulsation) is good and the hands are warm and moist. The feet are cold and the legs are cool up to the knees, more marked on the left. The feet shows a rather marked cyanosis in the dependent position, the discoloration grading off to the mid leg; upon elevation of the leg pallor is noted about one and one-half minutes. Posterial tibial pulse is present, but definitely weak, bilateral. The dorsalis pedis pulse is absent bilaterally. There is a third degree flat feet bilateral. No atrophic changes are noted at this time. There is no history of a previous phlebitis. Slight oedema of the feet and ankles is present and there is a history of such oedema for several years back. This patient has had pain in his feet and ankles for the past eight or ten years. This has been attributed to the marked pes planus, but it wasn't until some time later that the symptoms of circulatory disturbance became noticeable; actually he dates the coldness and color changes of the feet and legs back to a little over a year ago. He has never noted caludication, but has been on his feet very little for the

(Testimony of Dr. Frederick Kelly.)

past two years. He states that there is a dull ache present at times in the [74] legs, but nothing severe. Has never used tobacco excessively, but still continues to use it moderately in spite of advice to the contrary. I saw this patient about the middle of April, 1929, and at that time diagnosed him as a case of thrombo angiitis obliterans; I am still of the same opinion. He has been in hospitals now for two and a half months and has received all the usual procedure for Buerger's disease (contrast baths, postural exercises, rest, typhoid vaccine intravenously, physio-therapy, protection of the extremities from cold, and so forth). Only slight improvement has resulted. He is desirous of leaving the hospital for a time and states that he can continue the contrast baths and exercises at his home. Under the circumstances would recommend his discharge as a hospital maximum, hospital benefit case, with the understanding that he is to report to some hospital later for continuation of the other forms of treatment. No treatment for the pes planus is indicated at this time in view of the circulatory disturbance. All foci of infection present have been removed. I N. Mariella."

Now that is over the signature of I. N. Mariella, Major Medical Corps.

Major Mariella is at present, I believe, Chief of the general medical section at Walter Reed General Hospital, Washington, D. C. He ranks very

(Testimony of Dr. Frederick Kelly.)
highly as a surgeon. He is one of the best internists in the medical corps of the army. The report says that the posterial tibial pulse is present but definitely weak bilaterally. That is on both sides. Cyanosis is reddish blue discoloration. It states in the history that the pain dated back eight or ten years. Third degree flat feet are the most extreme form of flat feet, the last degree. Mr. Burleyson's foot at the present time, in the position it is in now is reddish blue. It does not indicate a high temperature. It is chilly and cold. (Mr. [75] Burleyson takes his stocking off.) When it is touched it is cold and is due to impaired circulation.

Mr. McNAB.—Might I ask, if your Honor please, that the jury, or certain members of it, be given an opportunity to touch the foot?

The COURT.—Well, I wouldn't direct the jury to do that.

Mr. McNAB.—No.

The COURT.—But if they wish, I have no objection to any juror trying the experiment.

Mr. McNAB.—It is so difficult to describe, that I request that the jury might do so.

The COURT.—If any juror desires to touch the foot he may, for the purpose of satisfying himself as to the temperature of the foot.

It is practically like touching a block of ice. The chilled exterior is due to impaired circulation. I have never tested for sensory nerve sensation. The

(Testimony of Dr. Frederick Kelly.)

pain has not become less because of the impaired circulation. It is still there. I do not believe that the exercise of rising on the toes would alleviate or assist the condition diagnosed as thrombo angiitis obliterans.

Cross-examination
by Mr. Wollenberg.

I am talking about the condition that I am familiar with as having existed for the last seven weeks and at the present time. The examination report of the history taken by Dr. Mariella at the Letterman Hospital indicates that the pain in the feet and ankles and the discoloration of the feet is more severe for the last year. This statement is as follows: "Actually he dates the coldness and color changes of the feet and legs back to a little over a year ago." [76] That bears the date of June 15, 1929. The color changes are marked reddish and blue discolorations in the leg when the leg is in a depending condition, when they are hanging down, and there is a marked pallor when they are elevated at right angles to the body.

Mr. McNAB.—We were reading testimony of the witness from Tahoe Tavern. At that time I called upon the government to produce, if they had, a report of the examination of the physician at the Tahoe Tavern. That report has now been produced from the United States Attorney's files. This is in connection with the witness' examination from

(Testimony of Dr. Frederick Kelly.)

Tahoe Tavern: "In the Compensation Claim No. 1,392,654, of Sidney T. Burleyson, personally appeared Dr. Guy Wallace of Tahoe Tavern, Lake Tahoe, California, who, being duly sworn, states: I am a practicing physician in the State of California. After his discharge from the military service on July 10th, 1919, I examined the claimant on July 20th, 1926. His complaint at that time was pain and swelling both feet, due to fallen arches—with chronic eczema region of toes. Upon physical examination I found the following symptoms present: marked displacement of arches. Moderate swelling of tissue around both feet and ankles. Eczema between toes with swelling. I diagnosed the injury of plaintiff as fallen arches and chronic eczema. The prognosis was bad. I do believe the claimant's disability is attributable to his military service, for the following reasons: claimant informs me that during his service he was operated for appendicitis and diseased tonsils. He resumed duty while in a weakened condition. Injury to feet no doubt due to marching and other duties. Claimant continued under my care until October 12th, 1926, during which time I treated him as follows: bathing feet in hot magnesium sulphate solution. Ointment for [77] eczema. Bandaging and so forth, and also gave instructions to patient to remain off feet as much as possible. Remarks, treatment on following days: July 20, 23, 25, August 1st, 7, 9, 18, 26, 31, September 9, 16, 24 and 30, October 8.

(Testimony of Dr. Frederick Kelly.)

Fifteen treatments at $2, total $30. Paid to me by claimant. Guy Wallace, M. D.

"State of California, City and County of San Francisco.—ss. Subscribed and sworn to before me this 16th day of March, A. D. 1927. Mark E. Levy, Notary Public in and for the City and County of San Francisco, State of California."

TESTIMONY OF F. PARRY,

witness on behalf of defendant, was read by stipulation.

I am the auditor of the Whitcomb Hotel and in that capacity I have charge of the personnel records of the employes. I have the record of employment of Sidney T. Burleyson; his first employment was October 20, 1926, as front clerk. He ended that employment on December 5, 1926. Our records show no reason given for the termination of that employment.

Cross-examination
by Mr. Wright.

My records do not show whether he quit of his own accord or not. My superior of Mr. Drury, one of the owners of the hotel. I never talked to him about this man's condition. I don't know that Mr. Drury was very kind to him. I know nothing whatever personally. He was there all together just about five weeks. I have no indication about the termination of his employment of his own accord.

TESTIMONY OF MRS. GEORGIA S. MILLER, witness on behalf of defendant, was read by stipulation.

I am living at the Warrington Apartments. In 1927 I had charge of the Worth Hotel in San Francisco, and at that time I employed the plaintiff in this case, Sidney T. [78] Burleyson, as a night clerk at $125.00 a month. I have the records with me of the hotel showing the period of his employment. Referring to the records, he went to work, I think, about the 3rd of April. I have it down here the 3rd of April, 1927. He continued that employment until August 15, 1928. When he came to work there I interviewed him personally. He made no complaint about the condition of his feet. I never heard him complain about his feet, but about the 1st of January, 1928, he complained of ill health, but I don't remember that he ever told me that it was his feet. He did his work satisfactorily. I think there were one or two occasions when he was away for a few days. He worked for me for a period of over a year. He left me to go to the hospital for treatment, he told me.

Cross-examination
by Mr. Wright.

His work was night work; he came at eleven o'clock and left at seven. During that period of the night of course necessarily there are very few people coming and going. During that period there was no reason why he could not have been seated

(Testimony of Mrs. Georgia S. Miller.)
in a chair in the office. I never questioned it, because there is no reason why he could not. There was no reason for him to be around on his feet, at all. I knew of his ill health; I felt very highly of him. When he left it was to go to the Government hospital for treatment. He was not much of a man to complain. I think on two occasions he had to hire another clerk in his place on account of illness. During those occasions he hired some other clerk and went away to get relief; and there were two occasions when it was necessary for him to apply for relief and finally went to the hospital to have treatment.

TESTIMONY OF DR. EDWIN A. HOBBY,

a witness on behalf of defendant, was read by stipulation.

I am a physician connected with the United States [79] Veterans Bureau. I am doing the general surgical and orthopedic examination. Orthopedic means diseases or injuries of bones and joints. I know the plaintiff in this case, Mr. Burleyson. I have examined him at the Regional Office of the United States Veterans' Bureau, on three different occasions. The first time was December 15, 1926, when he came up for an examination on a claim for disability. I made a diagnosis at that time. He had what is commonly called flat feet. I did not

(Testimony of Dr. Edwin A. Hobby.)

give him a general examination. I examined him as to his complaint. He gave me a history of having been operated on in 1919 for appendicitis, and his tonsils, and following that operation his feet began to bother him; and soon after that he was discharged on a surgeon's certificate of disability. He said that he had complained of his feet ever since that time; he gave his history as having gonorrhea nine months previous to my examination, and his present complaint was pain in his feet, after standing or walking much. That is all the history he gave me which pertained particularly to his feet. I found that his feet had the appearance of being congenitally broad and flat and somewhat pronated. They were not rigid, and he was able to stand on his toes with good strength. They were not swollen at that time. Bearing in mind the diagnosis of permanent and total disability with the terms of the Act which I have heard here and with which I am familiar, I would say he was not at that time totally disabled from following continuously any substantially gainful occupation. He was not permanently and totally disabled from the standpoint of following continuously a gainful occupation. There was not anything in his physical condition, from the standpoint of his feet, to prevent him from following any occupation, I do not care what. The next examination was on [80] February 27, 1928, and he gave a history at that time of having complained of his feet while in service,

(Testimony of Dr. Edwin A. Hobby.)

and having been discharged on medical survey. He said his feet began to swell in 1922, or rather, 1923, and that his toes got sore after that. His present complaint came from the arches of his feet, swelling and soreness of his toes, sometimes got sore under the anterior part of his feet, has been receiving treatment on the outside, that is, outside of the Veterans' Bureau, by private physicians probably, and in the out-patients department of the Veterans' Bureau since last May. This was May, 1927.

On examination, his feet were found to be congenitally broad and flat, and somewhat pronated. There was no swelling nor enlargement of joints. There were recent abrasions of the skin over the toes, as if from burns or blisters. There was a rather marked relaxation of the circulation of the feet, and the condition of which he complained was probably a circulatory one. The diagnosis I made at that time was, 1 Paes planus and pronatus, bilateral, second degree marked without rigidity, but marked subjective symptoms. It meant that he has very weak feet, and they are what are commonly called flat feet, but they were not of the extreme variety, intermediate, and that there had been no structural changes in the joints which makes the feet rigid and unflexible, and that he complained greatly of them. He did have some symptoms as pain and fatigue of his feet, probably pain in his legs; his feet bothered him a great deal. I also

(Testimony of Dr. Edwin A. Hobby.)

made a note, second diagnosis, circulatory disturbance in both feet, but I was unable to determine the cause at that time. I thought that it was due to having bandaged, strapped his feet a good deal, and having set up some swelling and abrasion. It had that appearance to me at that time, but I was not sure [81] of it, and I would not say. On the occasion of this second examination, he was not permanently and totally disabled within that definition which I have heard.

The third was not really an examination. He came into the office on March 26, 1929, and requested treatment, hospital treatment, and we are not obliged to make an examination for a record, except in so far as to satisfy ourselves that he is in need of hospital treatment, or that we think that hospital treatment is advisable, and we make a recommendation upon that. I simply made a note he was complaining of his feet swelling, and being stiff, and cold, and I referred to the records on file in the folder which I had before me for his condition, and especially to a report from the diagnostic center, which had just come in, I think, and I noticed that his condition was the same as reported on discharge from the hospital March 1, 1929; that is, the report from the diagnostic center was the same as the report on his discharge from the hospital, and I advised his going to the hospital for further treatment. I never advised amputation in his case; that question never came up, or entered

(Testimony of Dr. Edwin A. Hobby.)

my mind at any time that I saw him. I don't know what his condition is at the present time. I would not like to say without seeing him that his condition is one that necessitates amputation, or is likely to necessitate amputation, but with regard to the time that I saw him I would say that it was not necessary at any time when I saw him.

Cross-examination
by Mr. Wright.

The report by Major Hoy of the Medical Corps at the Presidio, and Major Marietta, which you have introduced in evidence here, in which they both diagnosed his trouble as this disease which has been described as thrombus angiitis obliterans, I neither agree nor disagree with that diagnosis, because I do not [82] know. I would not want to say without an examination. I am perfectly willing to examine him now and say. I am quite satisfied that at the time I made the two or three examinations of him, he was not a victim of that disease at that time.

I have seen quite a few cases of thrombus angiitis obliterans that have come to the Veterans' Bureau and otherwise. It does not occur with great frequency. I expect I have seen twenty or thirty cases since I have been connected with the Bureau. During that period I have had under my observation several thousand cases; I have made several thousand examinations in the last eight years for

(Testimony of Dr. Edwin A. Hobby.)
the Veterans' Bureau, and out of those several thousand I presume I have had no more than somewhere about twenty who have been afflicted with thrombus angiitis obliterans. They are a very negligible percentage of the diseases. It is a general physical disease. It is progressive as a rule. It is a circulatory disease, an infectious disease of the blood vessels, impairing the circulation of the limbs. I could not say that I have known of a case of thrombus angiitis obliterans which when once fixed in the human form, has been cured. I have seen some cases that have been so-called, that have either become arrested or where a mistake in diagnosis has been made. I don't think that quiet, relaxation, and relief from pressure of the limbs would make any difference in the arresting of the disease. I can not name a single case in my entire experience where any victim of that disease improved, or was cured while continuing physical or other labor, nor any other way. I do not think it would make any difference if a man with thrombus angiitis obliterans went out here and worked with a pick and shovel.

After my examination I referred him to the Letterman Hospital for treatment. I do not remember anything about [83] my asking him what was the matter with him and he said he did not know, at my examination, and my stating I really did not know what was the matter with him.

Mr. McNAB.—Didn't you ask Mr. Burleyson what he thought was the matter with him, and didn't he reply he did not know?

(Testimony of Dr. Edwin A. Hobby.)

A. Not that I know of.

Mr. WRIGHT.—Q. Didn't Mr. Burleyson ask that question of you, and didn't you tell him you did not know?

Mr. VAN DER ZEE.—Objected to as assuming something not in evidence, not proper cross-examination.

Mr. WRIGHT.—I am asking him on cross-examination, testing his qualifications.

The COURT.—The objection will be overruled, and an exception.

The WITNESS.—A. I have no recollection of Mr. Burleyson asking me any such question, and I have no recollection that he did ask me such a question, or any reply that I made to him.

I don't know that I saw Mr. Burleyson before March 27, 1928; I saw him on March 26, 1929, on February 27, 1928, and December 15, 1926. Referring to February 27, 1928, I have no recollection of any conversation with him; I must have had some conversation, because I got his complaint at that time, and I put down all the complaint that he made; I do not recall recommending to him that he should go to Letterman Hospital. February 27, 1928, I made an examination for compensation purposes, only, and the question did not come up as to hospitalization. I would say that I did not make any such statement as that to him.

DR. ELOESSER,

a witness on behalf of defendant, testified as follows:

Examination
by Mr. Wollenberg.

I am a physician and surgeon licensed to practice [84] and practicing in this city. I have been practicing since 1909. I am a graduate of Heidelberg Medical School. I have worked at various places. I am connected with Stanford University at present. I made an examination of Sidney Burleyson, the plaintiff in this case, on October 19, 1928. I did not make any diagnosis of thrombo angiitis obliterans at that time. I took the pulse of his feet. I found a good pulse in both arteries of both feet. The symptoms of thrombo angiitis obliterans that I would expect to find, if it existed, would be pain in the feet, usually increased by walking; usually increased by changes in temperature, such as heat; at times there would be blueness or pallor of the feet and absence of pulse in arteries in feet. The symptoms are suggestive of the man's pulse, they might have pointed to thrombo angiitis obliterans. All of those subjective complaints might have induced one to suspect such a disease but all the objective evidence was lacking. The complaint of the man himself might have suggested the disease but not the things that I could see for myself. The objective evidence, that is, what I myself might see, was lacking. I made a thorough physical ex-

(Testimony of Dr. Eloesser.)

amination of the man from head to feet, palpated his various blood vessels and took his blood pressure. Given the definition of permanent and total disability as "any impairment of mind or body which renders it impossible for a disabled person to follow continuously any substantially gainful occupation," and bearing in mind that it is reasonably certain that it will continue throughout the lifetime of the person suffering from it, and that then it is deemed permanent, with that definition in mind at the time of my examination I think he was probably not totally and permanently disabled. [85]

Cross-examination
by Mr. McNab.

My answer is that he was probably not totally and permanently disabled. I doubt that he could possibly have been so. There is a doubt in my mind. There was no circulatory impairment in his feet to any degree. They were discolored. I contribute that to a congestion of the veins. That is to a certain extent an impairment of circulation. There was something wrong with the man. I thought the man had arthritis in his feet. That is a chronic inflammation of the joints of the feet. Arthritis would not necessarily be accompanied by severe pain. There were no characteristic symptoms of thrombo angiitis obliterans, so that this subjective complaints, although they might give rise to suspicion, would not in my mind allow one to make

(Testimony of Dr. Eloesser.)
a statement that he had the disease or not. When he came to me he said he had something definitely, of a definite nature. The evidences related to me would be consistent with the existence of thrombo angiitis obliterans but scarcely over the period of time. I examined him in 1928, which was ten years after the beginning of the symptoms, and had that man suffered from thrombo angiitis obliterans for ten years he would have shown definite objective evidence of his suffering from the disease. That disease does not take eight or ten years to develop. I agree that a patient may continue to suffer from this disease from eight to fifteen years. If the arterial circulation is sufficiently disturbed it will lead to gangrene. Ordinarily amputation is the only relief for gangrene. His feet were not normal when I examined him. I am acquainted with Major Mariella of Letterman General Hospital. I met him but he was not in charge at Letterman General Hospital. I am acquainted with his reputation as a surgeon. [86] If Dr. Mariella while in charge of this particular patient, diagnosed his trouble as thrombo angiitis obliterans, that would not tend to shake my faith in my own diagnosis, as doctors notoriously disagree, and if another doctor might have given such a diagnosis, even though of the highest repute, it would not change my opinion. There is no doubt in my mind he did not have the disease of thrombo angiitis obliterans when I examined him. I am not perfectly sure of what he

(Testimony of Dr. Eloesser.)

had but I am sure of what he did not have. I do not think that he had a very marked circulatory disease of his feet. The temperature of his feet was rather cold. I did not take the degree. I would not say that they were icy. There is a certain feeble pulse present in one or more of the vessels in quite a large number of cases in thrombo angiitis obliterans. Medical authorities do express the view that pulse is present in as high as fifty percent, but not to the finger and it would be a quarrel among surgeons as to just what disease of the feet this man had.

Redirect Examination
by Mr. Wollenberg.

I think that he could have followed any vocation providing he didn't have to be on his feet too much. I think he could stand on his feet fifty per cent of the time. I think he could follow a position where he could remain seated, as clerk or stenographer.

Recross Examination
by Mr. McNab.

I think that he could have followed a sitting occupation, such as watch maker, stenographer, clerk or something of that kind, that is, assuming he had the necessary training and ability to do it. He should be sitting while doing it. [87]

TESTIMONY OF DR. JOSEPH S. HART,

a witness called on behalf of defendant, was read by stipulation.

I am employed by the United States Veterans' Bureau as a physician; I have been with the Veterans' Bureau since the 21st of February, 1924. I am a general practictioner. I made one examination of Sidney T. Burleyson, the plaintiff in this case. I have a record of my examination. May I use it? I examined him on February 27, 1928. I made a diagnosis at that time. Mr. Burleyson gave me a medical history of the case at that time. I have that history scattered through the examination. I also have it in answer to the details of claimant's disability since his service, and his present complaint. It is quite lengthy. Claimant's statement, only hospitalization since discharged from service was Southern Pacific Hospital, San Francisco, California, for operation on my eye, right, about February, 1923, operated for cataract on my right eye, remained in hospital for eye for six weeks. About three months after discharge from service to work as storeman, Mare Island Navy Yard, under civil service appointment; remained there for about one year, then to work for Southern Pacific Railroad Company as cashier in Dining-car, Hotel and Restaurant Department, for five or six months—I beg your pardon—for nine months; then did nothing much for five or six months, then to Del Monte Hotel, in storeroom, for three months,

(Testimony of Dr. Joseph S. Hart.)
then back after about two and a half months to Southern Pacific Railroad Company, dining service, with lay-off several times until September 3, 1923, when he quit; after two months to work as assistant clerk for the Emporium, San Francisco, until March, 1924, then to Fox Hotel, as hotel clerk, at Taft, California, for about eighteen months; about June 15, 1926; then laid off until July 25, 1926, when to work at Lake Tahoe as hotel [88] clerk, until October 1, 1926, when season closed. Then about November 1, 1926, to Whitcomb Hotel, San Francisco, for one month, then laid off until about 8th of January, 1927, when to work at Granada Hotel, San Francisco, as night clerk, until about the 18th day of February, 1927, then laid off until about the 2d of April, 1927, then to Worth Hotel as night clerk, and have been employed there ever since—still employed as night clerk at Hotel Worth, San Francisco; no accident nor sickness since discharge from service. In the body of my report there is reference to some other sickness in between, which it not give at this time.

Present complaint: It's my arches, and also a breaking out on my toes—arches are broke clear down; its the pain right under here, in the arches, both feet the same, right, directly under the ankle, right straight down, you might say; on the toes, as my feet swell, whenever stand on them for any length of time, its eczema. The eczema has been since some time about 1923, last part of 1923. That's

(Testimony of Dr. Joseph S. Hart.)
only ailment that I have, just my feet. Then follows the report of physical examination—shall I read that?

On physical examination, I have the following record: Fairly erect, well developed generally, very muscular arms, more than well nourished. Color appears to be excellent; but full blood report, including blood sugar determination will be attached when received. Skin not remarkable; has an old well-healed appendectomy scar, three-quarters inch diameter, superficial scar in the side, upper, one-third left leg; except that over great toe and next toe left foot, and over second and third toes right foot are two small areas of what appear to be recent abrasions, at edge of area on toe left, next great toe is some of the superficial layer of skin which looks like there had been a definite blister here which [89] had probably been chafed open. I do not find anything here on which to say eczema; these areas look to me like abrasions rather than skin disease. Claimant has tight bandage two and half or three inches around waist of each foot. He says that the bandages are because of fallen arches. He says the only skin involvement is on the toes; the areas of recent abrasions are small and all on the dorsal surface, none elsewhere. I am not requesting claimant to remove the bandages mentioned above in view of his story, and in view of the fact that his feet will be later examined and reported upon today by orthopedist; from what I see, especially

(Testimony of Dr. Joseph S. Hart.)
in view of practically no pronation being present, and weight of individual, I am inclined to consider as probably congenital low arch feet rather than broken arches; but as I have not taken bands off, see orthopedist report of condition. Throat somewhat hyperemic, tonsils appear to have been removed. Teeth fair condition, some repair, will be referred to dentist. Tongue not remarkable, very slightly coated. Lungs apparently perfectly normal, no abnormalities detected by me, but because of general order will be referred to T. B. specialist for his examination, his report will be on page 3. Heart action is of good strength, regular, no abnormal sounds or other abnormalities detected; no thrill. A. C. D. appears to be within normal limits. When sent to X-ray for chest, heart will also be included, so see X-ray for definite measurements. Claimant cannot exercise by jumping because of feet; he was, therefore, requested to exercise by stooping, hands above head to the floor, fifty times; this he did, and immediately after the heart rate was 96 G. S. R.; there was no evidence of nor any complaint of any distress, no cyanasis, no dispnea, no abnormalities of any kind detected, either when upright or recumbent. After exercising one minute heart rate 78 G. S. R.; [90] after one and a half minutes rate is at pre-exercise rate of 72. Abdomen soft, very considerable fat, no masses made out, no distention, no tympanitis, no rumbling, no tenderness nor sensitiveness from palpation, no spasm, no

(Testimony of Dr. Joseph S. Hart.)

rigidity; there is an old, well-healed surgical scar (Appendectomy 1919), no hernia, no hemorrhoids.

Genitalia; there is a well-defined scar, old, on fraenum; the left testicle is also somewhat larger than right, and the left epididymus is somewhat indurated; claimant admits gonorrhea lasting about three months in 1926; denies ever any other venereal disease. Extremities, see orthopedic report; from my examination slight abrasions tops of two toes each foot; apparently comparatively recent; no eczema found; possibly congenital flat feet. Claimant is wearing tight bandages around waist of both feet; there is practically no pronation here. Nervous system, referred to N. P. examination. No Romberg. No tremors. Pupils round, equal, react to L. not tried for D. None equal. Right is apparently definitely hyperactive; *tende* Achilles apparently right is a little more active than left. Superficial glands not remarkable. No edema, no ascites, no jaundice. At the time of my examination, it is my opinion that the plaintiff was able to follow continuously any substantially gainful occupation; as far as I could see any number of occupations.

Cross-examination.

Mr. WRIGHT.—I found no reason why he should not take any of any number of occupations, running an elevator. From what there is here, yes, I would be willing to ride from the top of the Russ

(Testimony of Dr. Joseph S. Hart.)

Building with him, in his condition, operating the elevator and standing on his feet. I could not say definitely how long that examination took; I should imagine it probably took up a matter of at least an hour. I do not recall seeing him before, nor [91] so far as I am aware have I ever seen him since. My entire knowledge of his condition is based upon this one examination and what I have heard in the courtroom of his condition. I never at any time saw him perform or attempt to perform any kind of labor. I am simply gaging it on my examination during this period of time. I have no way of knowing that if he were to stand upon his feet and engage in some physical exercise for six hours his feet would swell and become painful so that he could not any longer stand on his feet. On the basis of what I found, and from what I have heard at this particular time, I am stating that I do not see any reason why he should not keep on his feet; there is nothing to believe contrary to the evidence; that he was available for almost any work. I am not an orthopedist. I referred him to an orthopedist for an examination of his feet. I did not make any examination of the joints of his feet. I did not even take the bandages off his feet. I did not make an examination of the joints of his feet, because the Government has men who are specialists along those certain lines. We have specialists available, and we refer every case to specialists. I saw this man from the general medical examiner's standpoint, and not

(Testimony of Dr. Joseph S. Hart.)

a specialist. I do not pretend to be an orthopedist, skilled in the examination of the feet. I sent him to the orthopedist because of the fact that his claim involved the arches. As there are arch specialists there, it is not my function to do that. I do not pretend to be an arch specialist. I made no attempt to make the orthopedic specialist's examination. I was considering the whole body, and referred him to the specialist for that. I did not ask him to remove the bandages from his feet, because I referred him to the orthopedist. The nature and extent of the falling and breaking of the arches, I make an entry that there is practically [92] no pronation here. I did not conduct any examination by measurement and by scale of the pressure of his feet in that condition; I made no attempt to. I tried to go through the general examination of heart and lungs, and skin, as a general practitioner would. He came complaining about his feet. I made an examination of his heart. I did not find it here that he complained of his lungs. I made no examination of his feet but I made an examination of his lungs. I went over his body and found that he had had a cataract removed, had an operation for appendicitis, and had an operation for the removal of the tonsils, but he did not complain of any of those things, but the government sent him to a general medical examiner for examination, and for the specialist's examination in addition. I referred him

(Testimony of Dr. Joseph S. Hart.)
to somebody else for his feet, because it is not my function to examine him for that.

He came to me complaining of the condition of his feet, and I made such an examination as that I have referred to. I did not attempt to diagnose the trouble in his feet except as to some abrasions and as to the skin condition. There has been something there on the surface of the toe some abrasion. He came to me with a complaint concerning his feet and I referred him to somebody that was thought to be a specialist qualified to pass on that subject. There are very few who are familiar with the disease known to the medical profession as thrombus angiitis obliterans. I am not familiar with its treatment. I did not make any such diagnosis. I am not qualified to make a diagnosis of that disease as a specialist, and I am not a specialist. I examined his feet enough to arrive at the conclusion that he could perform satisfactorily in a great number of occupations. I pointed out the fact that the condition of the skin was due to the right bandaging. I do not believe I asked him whether these [93] bandages were being applied under the direction of a surgeon, I don't know, I could not say.

Redirect Examination.

Mr. WOLLENBERG.—As a general practitioner I was able to observe the condition of his feet, although as a matter of precaution I recommended an examination by a specialist on feet.

(Testimony of Dr. Joseph S. Hart.)

I absolutely disagree with the application of bandages around the feet. I don't know who applied them and that would make no difference, whatever.

Mr. WOLLENBERG.—At this time, your Honor, the government rests.

Mr. McNAB.—The plaintiff rests.

Mr. WOLLENBERG.—Then at this time I move this court for a directed verdict upon the ground that the plaintiff has failed to sustain the burden of proof with reference to the allegations of the complaint that he was totally and permanently disabled at the time this policy was in force, to-wit, in February of 1920; and that the evidence rather shows that he worked over a period of time of seven or eight years continuously at a substantially gainful occupation, and I move your Honor for a directed verdict on those grounds.

The COURT. I think the case is one that should go to the jury. I will deny the motion.

Mr. WOLLENBERG.—Exception.

Thereupon the jury retired and returned a verdict for plaintiff and fixed the date of permanent and total disability as of July 10, 1919.

Dated, November 9, 1932.

JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Plaintiff.
GEO. J. HATFIELD,
Attorney for Defendant. [94]

STIPULATION.

It is hereby stipulated by and between the above-entitled parties and their respective counsel that the foregoing bill of exceptions is true and correct, and that the same may be settled and allowed by the above-entitled court and made a part of the record in this case.

GEO. J. HATFIELD,
Attorney for Defendant,
JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Plaintiff.

ORDER APPROVING AND SETTLING BILL OF EXCEPTIONS.

The foregoing bill of exceptions is duly proposed and agreed upon by counsel for the respective parties, is correct in all respects, and is hereby approved, allowed and settled and made a part of their record herein, and said bill of exceptions may be used by either parties plaintiff or defendant, upon any appeal taken by either parties plaintiff or defendant.

Dated:

HAROLD LOUDERBACK,
United States District Judge. [95]

VETERANS ADMINISTRATION

United States Veterans Bureau
Washington

[Veterans Administration 1930 Seal]

Office of
The Special Counsel on
Insurance Claims

Jul. 10, 1931.

This Letter Refers to
Your File Number:
In Reply Refer to: L-28
C-1,392,654
Sidney T. Burleyson
vs.
United States

Mr. Sidney T. Burleyson,
Hotel Worth,
641 Post Street,
San Francisco, California

Dear Sir:

Acknowledgment is made of the receipt of your letter of June 16, 1931 requesting that you be advised as to the Administrator's decision with reference to a claim for insurance benefits which was filed January 11, 1931.

On June 11, 1931 the Administrator determined that the evidence in your case does not disclose that prior to the lapse of War Risk Term Insurance that you were suffering from any disability which

rendered you unable continuously to pursue a substantially gainful occupation. The action of the Director which was complained of and appealed from was therefore affirmed.

By direction,
Wm. Wolff Smith,
William Wolff Smith,
Special Counsel.

United States District Court
No. 19,029-L
Burleyson v. U. S.
Pltf. Exhibit No. 1
Filed 2/2/32
WALTER B. MALING,
Clerk,
By HARRY G. FOUTS,
Deputy Clerk. [96]

N. M. C. 385a-A & I.

United States Marine Corps.

TO ALL WHOM IT MAY CONCERN:

Know ye, That Sidney T. Burleyson, a Private of the U. S. Marine Corps, who was .....enlisted the 30th day of July, 1918, at Paris Island, S. C. to During War serve.....years, is hereby discharged Upon report of Medical Survey dated June 5, 1919 Origin

not in the line of duty, Disability is not the result of his own misconduct.

Said Sidney T. Burleyson was born January 4th, ~~18~~ 1900 t Belen, Missisippi, and when .....enlisted was 66½ inches high, ith Brown eyes, Brown hair, Ruddy complexion; occupation, Salesman; citizenship U. S. Applied for enlistment at R. H. Memphis, Tenn.

Given under by hand and delivered at Mare Island, Cal. this 10th day of July, 1919.

Paid in full $231 65/100.

R. A. Ramsey,
Lieut. Col., U. S. M. C.,
Commanding Marines.

Character: Excellent.

(over) Barracks Detachment. [97]

MILITARY RECORD.

Previous service None
Noncommissioned officer None
Marksmanship qualification Marksman, October 4th, 1918
Gun pointer No
Sea Service U. S. S. Albany, January 13-1919 to February 23-1919
reign service Pearl Harbor T. H. February 23-1919 to June 8, 1919
peditions None

Battles, engagements, affairs, or skirmishes None
Military efficiency Good Obedience Excellent
Sobriety Excellent
Remarks: Services honest and faithful

R. A. Ramsey,
Lieut. Col., U. S. M. C.,
Commanding Marines.
Barracks Detachment. [98]

C-1392654

120 Modern Rooms Fred H. Jensen, Mgr.

HOTEL FOX

Grill and Lunch Counter

Taft, California, 1/11/25

U. S. Veterans Bureau.
Los Angeles Calif.

Dear Sir:—

I was discharged from the U. S. Marine corps at Mare Island Calif. July 10th 1919 with Phisican Certificate Of disability, and desire to file a claim for Treatment and Compensation. I signed a statement to the effect that I would not come back on the Gov't for Any compensation. This I was forced to do. Prior to this time I have been Ignorant of the fact that I am entittle to my just Claims through a bill passed some time in the Year of 1922.

Will you kindly forward in the necessary blanks with instructions for filing as soon as posible.

Hoping to hear from you some time in the near future.

I remain,

Yours truly,
Sidney Theo Burleyson,
Fox Hotel
Taft Calif. [99]

[U. S. Veterans Bureau 1921 Seal]

Office of Regional Manager
UNITED STATES VETERANS BUREAU
San Francisco, Calif.
October 2, 1928
This Letter Refers to
Your File Number:
In Reply Refer to: 42c
C-1 392 654

Mr. Sidney T. Burleyson,
Herald Hotel,
San Francisco, Calif.
Dear Sir:

We are in receipt of a letter from the Los Angeles Office of the Veterans' Bureau enclosing the letter which you addressed to that office on January 11, 1925 requesting that blanks we forwarded to you in order that you might file a final application for compensation.

We are also in receipt of a copy of the reply made by the Los Angeles Office on January 14, 1925.

[illegible] H.

8-28-19. Re-admitted with: Appendicitis, acute. Origin. Not in conduct. Operation. McBurney incision. Ether anesthesia. No complications. Wounds well acted operation.
9-2-19. Stitches removed. Doing well.
9-12-19. Patient has hypertrophic tonsils. Tonsillectomy.
9-17-19. Discharged to duty. Well.

[illegible] II.

4-2-19. Pes planus. Origin. Not duty. Not misconduct. Art. 2902 [illegible] complied with. No statement. Existed prior to enlistment. [illegible] severe pain in arches and extending well up in legs upon standing. Feet and legs swell and patient claims he can not wear shoes for any length of time.
4-11-19. Condition improved.
4-21-19. Discharged to duty.

4-22-19. Pes planus. Origin. Not duty. Not misconduct. Art. 2902 complied with. No statement. Existed prior to enlistment. Patient said to be relieved from duty.
4-30-19. Transferred to

4-30-19 Re admitted with: Pes Planus. Origin. Not duty. Not misconduct. Art. 2902 complied with. No statement. Existed prior to enlistment. No improvement in the last month under rest and special exercise.
5-1-19. Report of medical survey states diagnosis: Pes Planus. Origin. Not duty. Not misconduct. Facts as follows: Condition existed prior to enlistment. Art. 2902 complied with. Complains of severe pain in arches, extending well up into legs. Feet and legs swollen. Can not wear shoes for any length of time. On examination feet markedly pronated. Rest, special exercises, etc. have given no permanent improvement.
Present condition: Unfit for service.
Probable future duration: Permanent.
Recommendation: that he be transferred to the NB Mare Island Calif for discharge from the service.
5-5-19. Transferred to-

[illegible] ISLAND Calif.
5-19-19. Pes Planus. Origin. Not duty. Not misconduct. Art. 2902 complied with. No statement.
7-11-19. Invalided from the naval service.

Physical defects noted at enlistment: Tenu galgum, old injury left leg. No inconvenience.

E. H. SMITH

DO NOT ADDRESS THE SIGNER OF THIS LETTER
BUT ADDRESS YOUR REPLY TO
BUREAU OF MEDICINE AND SURGERY,
NAVY DEPARTMENT, WASHINGTON, D. C.
AND REFER TO No

WASHINGTON, D. C

To: Veterans' Bureau, Washington, D. C.

Subject: Case, C- 1092654 WILLYSON Sidney Leo.

Reference: Call of 1-6-27.

In the case of the above named the records of this Bureau show as follows:-

Born: Place Belen, Miss Date 1-4-00.

Enlisted: Place Parris Island SC Date 7-[illegible]-18

Discharged: Place Mare Island Calif. Date 7-10-19.

[illegible] 2d Regt Parris Island SC.
8-6-18. Malaria. Origin. Not duty. Attack prior to enlistment. Aft. [illegible] complied with. No statement. Usual treatment. Parasites found.
8-11-18. Discharged to duty. No symptoms.

8-5-18. Anti-inoculation. typhoid. Origin. Duty. Usual treatment.
8-6-18. Discharged to duty under treatment.

9-7-18. Enteritis, acute. Origin. Duty. Due to diet. Patient reported at 4:00 PM complaining of abdominal cramps and constipation for two days. No history of vomiting. No tenderness or rigitidy on right side of abdomen. Transferred to-

NAVAL HOSPITAL PARRIS ISLAND CAMP.
9-7-18. Re-admitted with: Enteritis, acute. Origin. Duty.
9-8-18. TPR normal. Feeling better.
9-10-18. Discharged to duty. No operation. Feeling very well.

MB QUANTICO VA.
11-2-18. Influenza. Origin. Duty. Usual symptoms. Transferred to-

SICK QUARTERS MB QUANTICO VA.
11-2-18. Re-admitted with: Influenza. Origin. Duty. Usual course and routine treatment.
11-13-18. Discharged to duty. Well.

USS ALBANY.
2-22-19. Appendicitis, acute. Origin. Duty. Due to dietetic error. Diffuse cramps over abdomen. Physical examination shows tenderness at Mc Burney's point. Slight rigidity. Slight fullness.
Transferred to-

U.S. VETERANS BUREAU Claims Division, San Francisco Regional Office.
Claims Division
Form 3103—Rev. Dec., 1921.

REQUEST FOR MARINE CORPS INFORMATION

FOR USE OF—

DIVISION ..... **SUBDIVISION** ..... **SECTION** ..... **UNIT** .....

30155

December 16, 1926

It is requested that information be given on the subject checked and this sheet returned to **Record Verification Section, Claims Division, United States Veterans Bureau.**

Name Burleyson, (Last) Sidney (First) T (Middle)

Rank and organization U. S. M. C. or U. S. M. C. R. U.S.M.C.

Ship or station .....

Date of enlistment 7/3/18

Home address Mark Hotel, 160 Eddy St. San Francisco, Calif.

Alleged disability Broken arches

Incurred at Pearl Harbor, U. S. Naval

Allotment No.: A. .....

Compensation Claim No.: C. .....

Converted Insurance No.: K. .....

Term Insurance No.: T. .....

Date .....

Date of discharge 7/10/19

Incurred at Pearl Harbor, T.H.

Hospital No. ..... from ..... to .....

Hospital No. ..... from ..... to .....

Hospital No. ..... from ..... to .....

Hospital No. ..... from ..... to .....

By ALLAN CARTER, Chief, Claims Div., San Francisco Regional Office.

From: **Paymaster, Marine Corps Headquarters, Washington, D. C.** ..... 19.....

To: **Record Verification Section, Claims Division, United States Veterans Bureau.**

1. Premium deductions from ..... to ..... 19.....
2. Allotment deductions for Class A and for Class B from ..... to ..... 19.....
3. Certified copies of Forms 1-B .....
4. Date of return to pay status .....
5. Insurance increased to $ ..... from $ ..... on ..... 19.....
6. Reduced to $ ..... from $ ..... on ..... 19.....
7. Canceled on ..... 19.....
8. Insurance carried when discharged .....
9. Reinstatement of insurance .....
10. Date and amount of insurance originally applied for .....
11. Has final settlement been made? .....

By .....

From: **Major General Commandant, Marine Corps Headquarters, Washington, D. C.** January 6, 1927 19.....

To: **Record Verification Section, Claims Division, United States Veterans Bureau.** VIA: BM&S

12. Name in full and rank BURLEYSON, Sidney Thos. Pvt.
13. Date and place of birth 1-4-00, Belen, Miss.
14. Dates and places of enlistments or appointments 7-30-18, Parris Island, S. C.
15. Age at enlistment or appointment .....
16. Date of desertion .....
17. Date of apprehension .....
18. Date, cause, nature, and place of discharge 7-10-19 Mare Island, Cal. Hon. Char: Excellent, Medical Survey.
19. Changes in rank prior to July 1, 1918 pre war occupation: Salesman
20. On active service Nov. 1, 1917 .....
Prewar Occupation:
21. Date of death, cause, and line of duty status .....
22. Disability in line of duty .....
23. Disability result of willful misconduct .....
24. Emergency address Tempie Burleyson, (M) Belen, Miss
25. Future address same
26. Present location and rank .....
27. Date of indefinite furlough .....

M. R. THACHER,
By Major, A.A.&I.U.S.M.C.

9—9784 (SEE REVERSE SIDE) GOVERNMENT PRINTING OFFICE

Full instructions regarding the filing of the claim were given in that letter.

Your letter of January 11, 1925 cannot be considered a sufficient application for compensation because you did not make any answer to the letter written by the Los Angeles Office on January 14, 1925, and you did not file your formal application for compensation until December 14, 1926.

By direction,

ALLAN CARTER
Regional Adjudication Officer,
San Francisco, Calif.

United States District Court
No. 19029-L
Burleyson v. U. S.
Pltf. Exhibit No. 4
Filed 2/2/32,
WALTER B. MALING, Clerk.
By HARRY T. FOUTS, Deputy Clerk. [100]

(Photostats of pages 101-102-103 opposite.)

[Endorsed]: Filed Nov. 21, 1932. [104]

[Title of Court and Cause.]

PETITION FOR APPEAL AND ASSIGNMENT OF ERRORS.

The United States of America, defendant in the above-entitled action, by and through Geo. J. Hat-

field, United States Attorney for the Northern District of California, feeling itself aggrieved by the judgment entered on the 4th day of February, 1932, in the above-entitled proceedings, does hereby appeal from the said judgment to the Circuit Court of Appeals for the Ninth Circuit.

And in connection with its petition for appeal therein and the allowance of the same, assigns the following errors which it avers occurred at the trial of said cause and which were duly excepted to by it and upon which it relies to reverse the judgment therein:

I.

The District Court erred in denying defendant's motion for a directed verdict made at the close of all the evidence of the said cause upon the following grounds, to-wit:

(1) On the ground that the evidence in this case had not established a prima facie case for the plaintiff and was legally insufficient to sustain a verdict. [105]

(2) On the ground that the evidence in this case proves conclusively that the allegations of the plaintiff's complaint have not been established, in that plaintiff has been shown to have had continuous employment since the date of the lapse of his policy and in that there is no evidence whatsoever in the record that any condition of permanent and total disability existed during the period from the time of the lapse of plaintiff's policy up to the year

1926, and as to the period from 1926 to the date of trial, the evidence shows a partial disability.

II.

The District Court erred in entering judgment on the verdict herein when the evidence adduced at the trial of this action was insufficient to sustain the verdict or judgment.

WHEREFORE defendant prays that its appeal be allowed, that a transcript of the record of proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, that this assignment of errors be made a part of the record in its cause, and that upon hearing of its appeal the errors complained of be corrected and the said judgment of February 4, 1932, may be reversed, annulled and held for naught; and further that it may be adjudged and decreed that the said defendant and appellant have the relief prayed for in its answer and such other relief as may be proper in the premises.

GEO. J. HATFIELD,
United States Attorney,
Attorney for Defendant and Appellant.

Receipt of a copy of the within admitted this 4th day of May, 1932.

JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Plaintiff.

[Endorsed]: Filed May 4, 1932. [106]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND THAT NO SUPERSEDEAS AND/OR COST BOND BE REQUIRED.

Upon reading the petition for appeal of the defendant and appellant herein, IT IS HEREBY ORDERED that an appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore filed and entered herein be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the said Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that no bond on this appeal, or supersedeas bond, or bond for costs or damages shall be required to be given or filed.

Dated, May 3, 1932.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed May 6, 1932. [107]

[Title of Court and Cause.]

STIPULATION AND ORDER FOR TRANSMISSION OF EXHIBITS TO CIRCUIT COURT OF APPEALS.

IT IS HEREBY STIPULATED by and between the parties hereto that each of the exhibits introduced in evidence at the trial of the above-

entitled action be sent to the Circuit Court of Appeals for the Ninth Circuit to be used by the said Appellate Court, to be printed as part of the transcript on appeal and to be deemed part of the bill of exceptions.

Dated, October 20, 1932.

JOHN L. McNAB,
S. C. WRIGHT, R. S.,
Attorney for Plaintiff.
GEO. J. HATFIELD,
Attorney for Defendant.

It is so ordered.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Oct. 21, 1932. [108]

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of said Court:
Sir:

Please prepare a transcript of the record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the appeal heretofore sued out and perfected to said Court, and include in said transcript the following pleadings, proceedings and papers on file, to-wit:

1. Complaint.

2. Answer to complaint.

3. Petition for appeal and assignment of errors.

4. Order allowing appeal and that no supersedeas and/or cost bond be required.

5. Citation on appeal.

6. Bill of exceptions.

7. Stipulation re sending exhibits to Circuit Court.

8. Judgment and verdict.

9. This praecipe.

GEO. J. HATFIELD,
United States Attorney,
Attorney for Defendant.

Service of the within Praecipe of Transcript of the Record by copy admitted this 30th day of November, 1932.

JOHN L. McNAB,
S. C. WRIGHT,
per R. Scott,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 30, 1932. [109]

[Title of Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern Dis-

trict of California, do hereby certify the foregoing 109 pages, numbered from 1 to 109 inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said Court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $20.10; that said amount has been charged against the United States and the original Citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 7th day of December, A. D. 1932.

[Seal] WALTER B. MALING, Clerk,
by B. E. O'HARA,
Deputy Clerk. [110]

CITATION.

United States of America, ss:

The President of the United States of America.
To Sidney T. Burleyson, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden

at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein the United States of America, is appellant, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Harold Louderback, United States District Judge for the Northern District of California, this 3rd day of May, A. D. 1932.

[Seal] HAROLD LOUDERBACK,
United States District Judge. [111]

Receipt of copy of the within Citation on Appeal is admitted this 7th day of May, 1932.

JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Appellee.

[Endorsed]: Filed May 7, 1932.

[Endorsed]: No. 7023. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, v. Sidney T. Burleyson, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed December 9, 1932.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7023

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

SIDNEY T. BURLEYSON,
Appellee.

BRIEF OF APPELLANT.

I. M. PECKHAM,
United States Attorney,

A. C. WOLLENBERG,
Assistant United States Attorney,
Attorneys for Appellant.

Parker Printing Company, 545 Sansome Street, San Francisco.

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Cases Cited

No. 7023

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

SIDNEY T. BURLEYSON,
Appellee.

BRIEF OF APPELLANT.

STATEMENT OF FACTS.

This is an action by a veteran of the World War, Sidney T. Burleyson, for the benefits of a policy of war risk insurance. Appellee Sidney T. Burleyson enlisted in the Marine Corps September 30, 1918, at which time he was granted $10,000. war risk insurance. He was discharged July 10, 1919, under a surgeon's certificate of disability for flat feet. His insurance lapsed for non-payment of premium due February 1, 1920. Appellee's contention is that the policy matured because he became permanently and totally disabled prior to the lapse thereof due to "fallen arches in both

of his feet, and which condition later developed into what is known as thrombo engitas obliterance'' (Tr. p. 3).

The facts developed from the evidence at trial are as follows: immediately after enlistment the veteran suffered an attack of influenza and upon recovery departed from duty, while in the Port of Honolulu. He, after a short illness, had his appendix removed at the naval hospital at Pearl Harbor, at which place he also had his tonsils removed. The total hospitalization at that time was about thirty days (Tr. p. 14). After a period of light duty he again commenced drill and suffered severe pains in his legs from the knee down. This pain went into his feet and his arches fell and began to swell, the soles of his feet began to turn red. Within one week the arches fell from normal to completely flat. He was then surveyed out of the service by a Medical Board and discharged from Mare Island, California, September 10, 1919 (Tr. p. 15). At discharge the veteran signed a waiver stating no defects existed and that he was suffering from no disease or injury at that time. His testimony at the trial is that he was forced to sign this waiver by two officers at the Mare Island Hospital (Tr. p. 15). One week after discharge, on July 10, 1919, plaintiff went to work and from that time on we have the following industrial history, or work record (this we set forth herein in chronological order):

Started work at Mare Island, California, July 17, 1919, and worked continuously without interruption

until August 19, 1920, at a wage scale of $4.24 per day until December, 1919, and from that time until August, 1920, $3.84 per day (Tr. pp. 71-72).

On August 25, 1920, less than one week after leaving his employment at Mare Island, he was employed by the Southern Pacific Railroad in the dining-car service at Tracy, California, at $105. per month and found, for two weeks, and then transferred to Yuma, Arizona, at a wage of $115. per month and room, where he remained for nine months (Tr. pp. 85-86; 28-29). This was in June of 1921.

He was then employed at the Hotel Merritt. Oakland, as a room clerk for two months at $75. per month and found (Tr. p. 29).

His next employment was at the Hotel Del Monte in April of 1922 as a store clerk for two months at $70. per month and found (Tr. p. 30).

In July of 1922 he returned to the Southern Pacific Railroad Company, the dining-car service (Tr. pp. 85-86) working three months at Tracy, California, and four months, until April, 1923, at Imlay, Nevada, at a wage of $90. and found, and then at Bowie, Arizona, and Indio, California, at a wage of $90. a month and found. He then resigned from the Southern Pacific Railroad Company on September 2, 1923 (Tr. pp. 85-86).

On September 21, 1923, he was employed by the Emporium Department Store, San Francisco, where

he worked continuously until May 16, 1924, at $80. per month (Tr. pp. 87-88), During this period he attended Heald's Business College in San Francisco at night (Tr. pp. 88-89).

His next employment, as shown by the evidence adduced at the trial, was at the Fox Hotel, Taft, California, as a room clerk, commencing on January 1, 1925, and continuing until June 1, 1926, for a period of eighteen months at $125. per month (Tr. p. 32).

Upon leaving the Fox Hotel he was employed at Tahoe Tavern on Lake Tahoe for a period of three months as a room clerk from June, 1926, to September 30, 1926, at $125. per month and found (Tr. p. 90). At this time the Tahoe Tavern closed for the season and he was employed at the Whitcomb Hotel in San Francisco as a relief clerk for approximately two months at a wage of $90. per month and meals (Tr. p. 99).

Upon leaving the Whitcomb Hotel, appellee was employed for a period of two months at the Granada Hotel, San Francisco, at a wage of $75. per month and found (Tr. p. 34). On April 3, 1927, he entered the employ of the Worth Hotel in San Francisco, and continued there as a room clerk at a wage of $125. per month until August 15, 1928 (Tr. p. 100).

Appellee testified that over this period of time throughout the entire employment he was suffering from his feet, that they gave him pain and were occasionally covered with a red rash. However, the first

medical evidence offered at the trial was that of Dr. William Cooper Eidenmuller, who examined the appellee for the first time in the early part of 1927 (Tr. p. 50), while he was employed at the Worth Hotel, San Francisco, at which time this doctor made a diagnosis of thrombo angiitis obliterans, otherwise known as Berger's disease. This witness testified that in his opinion appellee was totally and permanently disabled at the time of his examination and prior to his discharge from the service (Tr. p. 55).

Lieutenant Frederick C. Kelly of the United States Medical Corps, stationed at the Letterman General Hospital, San Francisco, examined the appellee on January 7, 1932, and expressed the same opinion and considered him at the time of his examination totally and permanently disabled, however on cross-examination he stated (Tr. p. 45) that he could not tell whether or not appellee was permanently and totally disabled in July of 1919, unless he accepted as true the history given him by plaintiff, but he did not give any weight to the industrial history and work record that is outlined above. This witness stated that an individual was not permanently and totally disabled from the inception of this disease, and in this case he could not state when the inception of the disease occurred in Mr. Burleyson.

The other witnesses produced on behalf of the appellee were lay-witnesses, none of whom knew the appellee prior to the year 1927.

The government records introduced into evidence indicate the condition of flat feet prior to discharge and contains no information until December, 1926, when he reported to the Veterans Administration for the first time, and from that time on has been in contact with the Veterans Administration and the later few years a patient at government hospitals.

On behalf of the government Dr. Charles Ragle, physician of the Navy Department, who examined plaintiff at Mare Island in July of 1919 when he applied for a civil service position and was granted that position, testified as to the condition of plaintiff's feet and noted that the arches had fallen and were lower than normal, making a notation of about one-half inch drop in arches (Tr. p. 73). He passed appellee for civil service employment on July 14, 1919 (Tr. p. 74). Dr. P. J. Mangin, examining physician for the Southern Pacific Railroad Company (Tr. p. 80) and Dr. George R. Carson, also an examining physician for the Southern Pacific Railroad Company (Tr. p. 82), testified to their examinations and passed appellee for employment with that company, after giving the appellee a complete physical examination, of which proper records were made and preserved. As a result of passing these examinations, appellee was given employment and actually entered upon and continued the performance of his duties in each of these positions (Tr. pp. 85-86).

Lay-witnesses who were the employers of appellee, all testified to his work being satisfactory. Doctors

who examined appellee on behalf of the government at no time found him totally and permanently disabled and explained the condition existing in appellee as a progressive disease, the date of inception of which would be impossible to state.

Dr. Leo Eloesser (Tr. p. 108) stated that at the time of his examination on October 19, 1928, the subjective complaints might have induced him to suspect thrombo angiitis obliterans but the objective findings were all lacking upon which to make a definite diagnosis of that disease. He stated that at the time of the examination appellee was not totally and permanently disabled.

ASSIGNMENT OF ERRORS RELIED UPON.

Appellant relies upon the following assignment of errors contained in his assignment of errors (Tr. p. 127) as follows:

The District Court erred in denying defendant's motion for a directed verdict made at the close of all the evidence of the said cause upon the following grounds, to-wit:

(1) On the ground that the evidence in this case had not established a prima facie case for the plaintiff and was legally insufficient to sustain a verdict.

(2) On the ground that the evidence in this case proves conclusively that the allegations of the plaintiff's complaint have not been established, in that

plaintiff has been shown to have had continuous employment since the date of the lapse of his policy and in that there is no evidence whatsoever in the record that any condition of permanent and total disability existed during the period from the time of the lapse of plaintiff's policy up to the year 1926, and as to the period from 1926 to the date of trial, the evidence shows a partial disability.

ARGUMENT.

Our inquiry here is whether the jury's verdict of total and permanent disability at the date of the veteran's discharge, July 10, 1919, is based on substantial evidence. The burden is upon the plaintiff below to establish total and permanent disability while the policy was in effect.

United States v. Hill, 61 Fed. (2) 651 (C. C. A. 9);

Eggen v. United States, 58 Fed. (2) 616 (C. C. A. 8).

In this case the evidence is consistent with a hypothesis that the disability was not total nor permanent during the time that the policy was in force. By no stretch of the reasoning can the verdict of the jury herein be deemed consistent with the evidence adduced at trial.

In reviewing this evidence the first thing that strikes our attention is the long, continuous work

record and the substantial remuneration received for all of that employment. It is true that appellee was surveyed out of the United States Marine Corps with flat feet, but within one week of his discharge he was examined by Dr. Charles E. Ragle at the United States Navy Yard at Mare Island for civil service employment and accepted as a civil service employee. Dr. Ragle made an examination report to the Federal Civil Service Commission, which report is in evidence (Defendant's Exhibit No. 1). The employment at Mare Island Navy Yard, the result of this physical examination, in itself would controvert any claim of the plaintiff that he was totally and permanently disabled at that time. It is then quite significant that within five days of leaving his employment at Mare Island the veteran herein was examined for employment and accepted for employment by the Southern Pacific Railroad Company, and as a result of the examination by Dr. George E. Carson and Dr. P. J. Mangin, examining physicians of the Southern Pacific Railroad, he was employed by that company at salaries which it will be noted included in most cases board and room, in addition to the money received. Various hotel employments were as room clerk and many of them included either room or board, or both, in addition to the money received.

This employment record, therefore, is to be considered as continuous from July 17, 1919, when he started work at the Mare Island Navy Yard, to and including his employment at the Worth Hotel in San

Francisco, which employment he left on August 15, 1928.

The only testimony in evidence which would indicate a total and permanent disability is that expressed as an opinion by the plaintiff's doctors, none of whom saw or examined plaintiff prior to the early part of the year 1927.

It has been held by this court in the case of *United States v. Charles A. Kerr,* 61 Fed. (2) 800 (C. C. A. 9), that to prove total and permanent disability plaintiff must show by a fair preponderance of the evidence, impairment of capacity to carry on continuously a substantial, gainful occupation, which total impairment is reasonably certain to continue during life.

> "Totality and permanency are essential elements and must be established by substantial evidence and can not be found by speculation, surmise or conjecture."
>
> *United States v. Kerr,* supra.

> "Some substantial evidence must be presented to carry the case to the jury. The subsequent employment for the periods covered, in the absence of evidence of inability to work—not merely unemployment—and the nature of the injury complained of, refutes the idea that appellee was totally and permanently disabled at the date of discharge. United States v. Barker, 36 Fed. (2d) 556; United States v. Rice, 47 Fed. (2) 749; United States v. Harrison, 49 Fed. (2) 227;

United States v. LeDuc, 48 Fed. (2) 789; Ross v. United States, 49 Fed. (2) 541."

United States v. Kerr, supra.

THE EVIDENCE OF PLAINTIFF'S DOCTORS ALONE CAN NOT CONTROL THE VERDICT HEREIN.

It has been held that evidence which is contradictory to the physical facts or which is obviously false, is not substantial evidence.

United States v. Hill, C. C. A. 8, January 12th, 1933;

United States v. McGill, 56 Fed. (2) 522 (C. C. A. 8).

The verdict of the jury, although entitled to great weight, can not be founded only upon the opinion of experts concerning the cause of a condition, which condition is itself established by the opinion of experts.

United States v. Hill, supra;

United States v. Kerr, supra;

United States v. Kims, 61 Fed. (2) 644 (C. C. A. 9).

This substantial continuous work record, whatever may have been the development of the veteran's disability, is such that he could not have been totally and permanently disabled within the definition of those

terms during the time he was engaged in his employments.

United States v. Kims, supra;
United States v. Seattle Trust Co., 53 Fed. (2) 435 (C. C. A. 9);
United States v. Rice, 47 Fed. (2) 749 (C. C. A. 9);
United States v. Harrison, 49 Fed. (2) 227 (C. C. A. 4);
Ross v. United States, 49 Fed. (2) 541 (C. C. A. 5);
Nalbantian v. United States, 54 Fed. (2) 63 (C. C. A. 7).

From any consideration of the plaintiff's occupation, whether it be considered a "light" or a "heavy" occupation, the fact remains that plaintiff was engaged continuously at an occupation. The burden was on him to show that that occupation was not a gainful one, and there is no evidence of a substantial nature, or otherwise, in the record to show that his occupations were not gainful.

United States v. Cornell, C. C. A. 8, January 14th, 1933.

The plaintiff has failed by his evidence to establish that his disability was total or permanent at any time, and that question is left entirely in the realm of speculation and conjecture.

We therefore contend that the motion of the government for a directed verdict in its favor should

have been granted, and that the judgment of the court below must be reversed.

Respectfully submitted,

I. M. PECKHAM,
United States Attorney,

A. C. WOLLENBERG,
Assistant United States Attorney,
Attorneys for Appellant.

No. 7023

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

SIDNEY T. BURLEYSON,
Appellee.

BRIEF ON BEHALF OF APPELLEE.

JOHN L. McNAB,
S. C. WRIGHT,
Crocker First National Bank Building, San Francisco,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 7023

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

SIDNEY T. BURLEYSON,

Appellee.

BRIEF ON BEHALF OF APPELLEE.

HISTORY OF THE CASE.

This is the second appeal to this Court. The case has twice been tried before juries in the District Court. In each instance the jury returned a verdict for the plaintiff. The first judgment for the veteran was reversed on the technical ground that a written disagreement with the Veterans' Bureau had not been established. On a retrial the disagreement, under the new statute, was admitted and the jury again returned a verdict in favor of the veteran.

QUESTION TO BE DETERMINED.

The veteran appellee having been discharged on report of the medical survey as permanently disabled,

and affirmative evidence produced by the army surgeon, government reports, qualified attending physician and various lay witnesses to the effect that the appellee was permanently disabled by an admittedly incurable disease, is the verdict of the jury to be reversed because the appellee, over an extended period (during a large part of which he was ignorant of his right of veteran's relief) intermittently worked for various employers in an effort to support himself and pay his doctors, each employment being terminated by inability to continue the occupation?

STATEMENT OF FACTS.

The appellee enlisted in the Marine Corps at the age of eighteen. He had always been a farmer and had never gone beyond the tenth grade in school. (Transcript page 13.) He enlisted July 30th, 1918, and was discharged, under a medical survey, July 10th, 1919, having served within a few days of one year. (Exhibits pages 126-7.) His year of service was a constant succession of maladies. Before departure from Quantico for Vladivostok he was ill six weeks in temporary barracks, the hospital being filled. After convalescence, he embarked for Vladivostok. Before arrival in Honolulu he became ill and on board ship was stricken with appendicitis. At Pearl Harbor his appendix was removed, and while still in his cot, his tonsils were removed. After a few days he was put on duty carrying cans, etc., then sent to heavy drill duty. Thereupon commenced the trouble which even-

tually resulted in his discharge and present condition. (Transcript pages 13-14.) He became afflicted with terrible pains, his arches crushed down and began to swell; his feet turned red and arches went flat. He was sent to the hospital with "terrible pain in my legs and feet up into the calf of the leg below the knee." Without any application on appellee's part, he was ordered up for medical survey before three or four surgeons while in the Hawaiian Islands, was declared unfit for duty and sent to Mare Island for discharge. At that time he was suffering with terrific pains and his limbs had turned red. (Transcript page 15.)

Medical survey on discharge finds permanent disability.

The report of the medical survey is found among the exhibits (pages 126-127). It is:

> "Complains of severe pain in arches, extending well up into legs. Feet and legs swollen. Cannot wear shoes for any length of time. On examination feet markedly pronated. Rest, special exercises, etc., have given no permanent improvement.
>
> Present condition: *Unfit for service.*
>
> Probable future duration: *Permanent.*
>
> Recommendation that he be transferred to the MB Mare Island, Calif., for discharge from the service. * * *
>
> 7/11/19 *invalided* from Naval service."

Thus we start with the initial finding of the medical survey that the veteran was discharged for *permanent disability.*

Several days before his discharge two petty officers presented to the appellee a waiver. He was not permitted to read it, but their order to him was: "Never mind; just sign." He refused and the commander then ordered him to sign and he obeyed. He understood it to be a waiver of all claim for compensation and hospitalization and that he had no claim against the government. "They made me sign it."

The case is noteworthy because of the obvious fact that the appellee was ignorant of his rights, assumed that he had waived all claims and that he was entitled to no hospitalization or attenion, and struggled on supporting himself and paying doctors at the expense of his health.

STATUS AS TO POLICY.

Unlike most veterans, the appellee did not cease payments on his policy at the time of his discharge. On the contrary, he continued to pay the premiums for about seven months after his discharge, and it was stipulated at the trial that his war risk insurance was in full force, by virtue of premium payments, until March 1st, 1920. (Transcript page 63.)

We thus have the unusual situation of a veteran continuing the premiums on his policy for seven months after he had been discharged for permanent disability.

THE QUESTION PRESENTED.

The question before the Court is this:

The jury having found in favor of the appellee, is there substantial evidence to support the finding of the jury that it was impossible for the appellee to follow continuously a substantially gainful occupation for which the veteran is qualified?

THE LAW.

It is settled in this circuit and others that where a jury has returned a verdict, the only question is:

> "Was there any substantial evidence from which the jury would be warranted in finding total and permanent disability.
>
> *U. S. v. Meserve,* 44 Fed. (2d) 549 (9th Circuit);
>
> *U. S. v. Griswold,* 61 Fed. (2d) 583 (9th Circuit);
>
> *U. S. v. Baxter,* 62 Fed. (2d) 182 (9th Circuit).

In considering the evidence the rule is that the policy is to be liberally construed to protect the rights of the insured.

U. S. v. Sligh, 31 Fed. (2d) 735.

THE EVIDENCE WITH RESPECT TO PERMANENT DISABILITY DURING THE LIFE OF THE POLICY.

The veteran, having terminated his service in the Marine Corps by honorable discharge on report of the medical survey on July 10th, 1919, continued to

maintain his policy in full force and effect until March 1st, 1920. (Transcript page 63.)

The evidence is overwhelming that the appellee is a victim of a disease, rare in the human family, defined as "thrombo angiitis obliterans," otherwise known as "Buerger's disease." This is a progressive disease resulting from a breaking down of the blood vessels in the extremities and a suspension of circulation.

Lieutenant Kelly, government surgeon at the Letterman Hospital testifying for the appellee and against the Government, graphically describes the origin and progress of this distressing disease. (Transcript page 37.)

This witness has himself contributed a medical treatise on this particular subject, and is the author of various monographs recognized by the profession with regard thereto.

We quote from his testimony as follows:

> "The disease is best known or described by the name thrombo angiitis obliterans; thrombo means 'clot'; angiitis means 'inflammation of a blood vessel'; and obliterans means 'obliteration.' Of its cause, nothing definite is known. There are many conjectures but nothing has been proven by workers on the subject. In the blood vessels themselves the first thing that happens is the thickening of the inner lining of the blood vessel; the next thing is a laying down of a soft clot in the blood vessel. Following that, this clot is gone. By that we mean that there is scar tissue and active tissue as well comes into the clot, and the

clot goes on to gradually and eventually cause obliteration of the blood vessel. One of the usual concomitants is much pain. There is usually two types of pain, one type of pain is that which is brought on by exercise relieved by rest, the other is present when there is rest and is present at all times."

That this disease had its origin during the service of the appellee in the Marines admits of no question under the evidence.

That he was, by virtue thereof, permanently disabled at the time of his discharge from the service likewise admits of no dispute.

The report of the medical survey, already quoted, inserted at page 126 of the Transcript, definitely states that there will be no improvement and that the disability is permanent.

Corroborating this, Dr. Kelly testified as follows (Transcript page 38):

"He seemed to be suffering constant pain. It is a progressive disease, from the mild form to a more severe. As time goes on it becomes progressively worse. There is nothing known to the medical or surgical profession which will result in complete cure. Something can be done for improvement but not for cure. I can not say whether or not he will ever be better than he is at present. I don't believe he will obtain relief without surgery. Ultimately, without some relief, this congestion in the blood vessels will result in gangrene, and gangrene must be eliminated by amputation. That is a thing that will always be considered in this case. To avoid amputation

you have to undergo a long period of hospitalization with intensive treatment."

Speaking then of the legal definition of permanent disability, Lieutenant Kelly testified (Transcript page 39):

"My opinion is that the plaintiff is permanently disabled and has been at all times since he has been under my observation."

Again (Transcript page 40):

"The Court. Q. From the statement made by plaintiff, if you accept his statement to be true, do you feel that he was totally and permanently disabled at the time of his discharge from the service?

A. I believe he was, yes sir."

Asked concerning the labor record of the appellee, Lieutenant Kelly testified as follows (Transcript page 41):

"Q. How do you reconcile that work record with this history in your mind?

A. It does not conform to the definition. It was not a *continuous* work record."

Thereupon, the Court, pursuing a highly intelligent examination, proceeded:

"The Court. Well, doctor, the circumstance is this, I presume, that you feel that if he has stated correctly to you his condition and as to the time, that he was unfit to follow any employment; you don't say he couldn't have done the work indicated, but you think in doing so he was impairing his health; in other words, a man might have consumption and still continue at a

task, although in doing the work he is shortening his life, is that your idea? He was hurting himself when he did that work?

A. Yes sir." (Transcript page 41.)

Again, being questioned by the Court, on page 45 of the Transcript, he says:

"Q. And in this case if you accept the history as given on the witness stand as true, if that history is true, in connection with your own observation, do you feel that he was permanently and totally disabled at the time he was discharged; you do, don't you?

A. Yes sir."

Stating that the disease may run a course of from five to fifteen years, ending in gangrene, the witness stated:

"The Court. When they had gangrene—the only remedy (amputation)—where there is gangrene?

Q. And is that the invariable course in this disease?

A. Untreated, yes."

The acompanying symptoms described by the government physician in the appellee's case were suspension of circulation, diminished or obliterated pulse, bursting of the skin, exuding of pus and other distressing accompaniments indicating a well advanced state of the disease.

Quoting from page 49:

"He will have to undergo treatment in order to keep himself stationary as he is at the present time, for the rest of his life. He may undergo

> the cutting off of certain nerve centers and obtain relief, but not a cure. I do not believe his limbs will ever be any better than they are at present. Any kind of work that entails the use of the lower limbs would aggravate the trouble or at least retard possible recovery. Work entailing the use of the legs is detrimental to his health."

Taking now the testimony of Dr. Eidenmuller, who first diagnosed the disease correctly, attention is called to his testimony on pages 52 to 59 of the transcript. He says:

> "It is a comparatively rare disease among human beings. There is no known treatment or cure for it. * * * It is a progressive disease."

The witness then stated that the disease probably had been of twelve years' duration. This puts it back long before the expiration of the appellee's policy.

The witness stated, without question, that the appellee was afflicted with the disease while still in the service of the United States (page 55), and that he was permanently and totally disabled during the time he was in the marine service of the United States and that the disability has continued to the present time.

Speaking of the possibility, if not probability, of amputation as the only relief, the witness testified:

> "It is a progressive disease. In the normal course it progresses beyond the point where it is and may continue that way, but in that event it would mean continued life of mental suffering and physical disability. On the other hand there might come a time not far off, or further off, I

hope, when it does come, when nature will not be able to supply enough blood through the collateral vessels for the feet and legs to live, in which event they will die, and when those parts die suddenly—we speak of that as gangrene, and when that takes place—when the limbs are alive they must have nutrition to live on, but such a condition as this can extend and continue, but if it reaches this stage and results in general infection, amputation, of course, in such instances is required. Up to several years ago from seventy-five to eighty-five per cent, roughly, came to amputation in from five to fifteen years, but modern lines of treatment have been able to prolong the incident of such an ending.

In my opinion, Mr. Burleyson's case as it stands today is about twelve years old. I am not able to state at this time whether amputation will be necessary or not in his case but it is my opinion, from my observation of the case from the spring of 1927 and continuing on during each year up to January 11, 1932, noting the progress and the conditions during these years, that amputation will probably become necessary at some future time. It has become progressively worse over this period of time and in the majority of cases it progresses and becomes worse. There is no cure known either to medical or surgical science."

Added to these, of course, were various witnesses who testified to the continuity of the trouble.

The appellee's work record.

The Government relies upon the work record of the appellee to defeat the claim.

There could be no more frank and open recital of the work record than that which came from the lips of the appellee himself.

The Court will note that this appellee, who had never passed beyond the tenth grade in school, and who had enlisted in the Marines at eighteen, was, on his discharge, asked to sign a waiver. He believed this waiver barred him from any possible relief. After his discharge by the medical survey, as permanently disabled, he, nevertheless, endeavored to work in order to live. He had no other means of support. He was receiving nothing from the Government and did not even know that he was entitled to hospitalization. It was years afterwards, when a fellow veteran advised him that waivers did not bar relief and that Congress had relieved against such waivers, that he first made application to the Veterans' Bureau, in the year 1925. (Page 16.) That was six years after his discharge.

During this time the appellee had made numerous efforts to work. All of these efforts are detailed in his testimony on pages 13 to 25 inclusive. It will be noted that these repeated efforts were spasmodic and short lived. Each period of employment had to be terminated because the appellee could no longer go on on account of his suffering. Generally the work was that of a night clerk in a hotel where he could sit with his feet propped up to relieve the circulation.

The frank testimony of the appellee is found on pages 18 to 25 inclusive of the transcript. Summarized briefly, it is this:

"I have endeavored to work since my discharge. The first time I ever went into the Bureau was in 1926 (seven years after his discharge), and they granted my application, and up until that time I didn't believe I had the right to go there for treatment. *I had no source of income upon which to rely.* I took medical treatment from time to time. *I had to work in order to live.*"

He first started at Mare Island classified as a riveter, but did no such work. He was transferred to the office, rested a good deal, took care of serial numbers on gasoline drums as his chief work.

"It made my feet swell up and look terribly bad. I did not undergo medical treatment at the Island. I thought if I went there they would let me out. I used the hot salt water and stayed home whenever I could."

Proceeding, he details his efforts at self-treatment, his endeavor to stay in bed, finally ending in his being compelled to give up the job and leave the Island. His only reason for quitting was his inability to work and he went to the Hot Springs for mineral baths. Then it was off and on from one job to another in an effort to sustain himself.

It is contended that when he went to the Southern Pacific he had a physical examination. It was a perfunctory affair of heart and lungs and sight, etc. No examination was made of his feet and he says (page 20):

"I did not disclose to them the fact that I was suffering with bad feet. I was afraid I couldn't get a job if I did."

Then two weeks off and more salt water treatments, with constant suffering and swelling. More work for the Southern Pacific and more suffering.

Why did he work? Let him answer!

> "I worked because I had no other way to live. I did not feel able to work. I got very bad and the heat seemed to affect me too and make me worse. I came back to California because I felt I would get relief again."

Then night work in the Merritt Hotel, where he sat propped up through the night with his feet on chairs to keep the blood from running down. To physician after physician, *all at his own expense.* Never working at anything more than a few months and then abandoning the position to take treatments and get relief from his agony.

At every place he attempted to conceal his condition in order to work and get money to pay physicians and eat. He was never discharged (page 24), but always had to leave on account of the pain.

He said (page 24):

> "I know of no occupation that I was able to be employed at except temporarily. I have never left any position for any other reason except my trouble."

Regarding the latter years, this evidence is undisputed:

> "Q. In the last four or five years have you done any work?
>
> A. No sir.
>
> Q. These last four or five years have been taken up how?

A. In hospitals and with doctors' treatments outside.

Q. Doctor; independent physicians outside. They were paid by whom?

A. By myself.

Q. Paid by yourself. Do you know of any gainful occupation whatsoever that you might be able to turn your hand to now in order to make a living?

A. No sir. If I had any I would be willing to try it."

For over four years prior to the trial he had never been able to wear shoes. When out of bed he wore woolen socks and slippers. One foot has no pulse.

The evidence discloses in this appellee an unique character.

Entering the Marines at eighteen, he suffered successively influenza, appendicitis, removal of tonsils, crushed arches, flat feet and Buerger's disease. He had them all in the brief year of service.

Ordered discharged for permanent disability, how can the Government now deny that disability? Its own record confronts it.

On his discharge a waiver was exacted. A young uniformed farmer boy, who knew nothing of the world, was not even advised that he was entitled to hospitalization and care. He therefore set out on a gallant struggle to earn a living by shifting from one job to another, when the going became too great to continue.

While other veterans were getting compensation and hospitalization, this uncomplaining veteran was

paying his own physicians, working in spite of pain to provide personal sustenance and physicians' care.

The very fact that he made an effort, under forbidding handicaps, to keep himself from charity and to obtain physical relief, is now urged by the Government as a barrier to recovery.

Gainful occupation.

This Court has held in *United States v. Rasar,* 45 Fed. (2d) 545 (9th Circuit), that:

> "Total disability exists when the disability renders it impossible to pursue *continuously* any gainful occupation *for which the Veteran is qualified.*"

This veteran was never equipped, by education or training, for any job except that of a farmer.

There can be no more complete parallel to the facts in this case than found in the concluding passages of the decision of this Court in *United States v. Rasar,* supra.

There, because the veteran had worked, the Government contested his claim. But the Court held that the statute does not require an incapacity to work at all, and held that he was not barred where the labor "was intermittent and was continued only for brief periods and invariably resulted in relapses which totally unfitted him for work."

The Government there contended, as it contends here, that there were various occupations to which the veteran might turn his attention. The language directly applicable to this case, is as follows:

> "The Appellee, prior to his enlistment in the military service, was a farmer, and his testimony gives unmistakable evidence that he is a man of very meager education. That he is utterly incapable of performing clerical work there can be no doubt. He has neither the education nor the training to qualify him for any such employment, nor is it possible for him at this period of life to fit himself for clerical work. It is worse than idle to speculate about the appellee being able to earn a livelihood in the performance of clerical duties."

Thus, the Government, who took a healthy young farmer into its Marine Corps and at the end of a year discharged him as permanently disabled, now contends that he is barred from relief because he has, at the risk of his life and in constant pain, endeavored to provide himself with funds to live and treat his diseased limbs.

As Lieutenant Kelly, the Government surgeon, and Dr. Eidenmuller, the attendant physician, pointed out, every effort at labor is at the expense of his health and the danger of his life. The questions of the trial judge developed this most clearly. Of course he can work, as can a tubercular or a man dying of diabetes, but every day's labor drains his resources and brings him nearer to the dread day when an amputation may become necessary.

The work performed by the appellee, under all the authorities, does not show him physically capable of continuously pursuing a gainful occupation for which the appellee is qualified.

The disability of the appellee has been not only legally complete but actually complete for years. We quote from his testimony (page 35):

> *"It has been four years since I have earned anything. I have no income at the present time."*

THE AUTHORITIES.

No circuit in the United States has taken more advanced and liberal ground than the Ninth Circuit, in dealing with the labor record of veterans.

In *United States v. Griswold,* 61 Fed. (2d), 583, the veteran had worked intermittently for ten years. This involved work in a saw mill, in camp, driving team, river work, forest service, cant hook work, sledding and loading, cutting and raising crops and feeding cattle, general ranching, dairying, including milking and operation of a ranch, packer for forest fire station, hooker in a logging camp and lumbering by contract.

His wages were from $100.00 a month to $4.00 a day. This work continued intermittently from 1919 to 1929.

This Court held:

> "That there was substantial evidence to go to the jury upon the proposition that although plaintiff actually worked for long periods of time, he was not then able to do so, nor to do so continuously."

Ever since the decision in *United States v. Sligh,* 31 Fed. (2d), page 735, this Court has declined to

penalize a veteran for attempting to support himself by labor, where such labor was not continuous and uninterrupted and which was performed at the expense of his health.

In the latter case, the veteran received, during a part of the time, $125.00 a month, at another $250.00 per month, with an expense allowance. Yet it was found that within the meaning of the statute he was permanently disabled.

In *United States v. Rasar,* 45 Fed. (2d) 545, the veteran worked delivering fish, driving cars, acting as Game Warden. This labor, performed by one who had been a farmer, was held not to overcome the finding of the jury in his favor.

In *United States v. Meserve,* 44 Fed. (2d) 549, the work record was extensive. Discharged August 19, 1919, the policy lapsed for payment October 1, 1919. The burden was therefore on the appellee to establish that he became totally and permanently disabled prior to the last mentioned date.

Prior to military service he was a brakeman. After his discharge he returned to that employment and worked there from his discharge, September, 1919, until October, 1921, a period of twenty-six months, and thereafter irregularly as a taxicab driver during 1922 and 1923. During the twenty-six months he earned $5275.06, receiving $5.59 per day.

Commenting on the strength of this testimony, this Court said, in supporting the verdict of the jury in favor of the veteran:

> "From the record before us, however, it will not do to consider this proof abstractly, but there must be taken into consideration additional facts and circumstances which we believe shed material light upon the actual condition of the insured. The question is not what the railroad company's pay roll shows, *it is what was the physical condition of the insured at the time.*"

The veteran lived nine years after his discharge. This Court said:

> "We are not concerned with the relative weight and convincing force of the testimony offered in behalf of the respective parties. The question we are called upon to deal with is whether there was any substantial evidence from which the jury would be warranted in finding total and permanent disability as alleged."

Much has been made by the Government of the fact that the appellee Burleyson did not disclose his affliction when he went through the perfunctory physical examination for employment by the Southern Pacific and in his conversation with others.

The appellee explained his desire to conceal his affliction because the mere suggestion of his disability would prevent his employment. He suffered and worked in an attempt to live.

A similar situation arose in *United States v. Meserve,* supra, where it was admitted that the insured veteran wrote a letter in which he said that during the time he was working he was in good health; "in fact had never felt better in his life."

This Court understood the human element involved and pointed out that such efforts to clear themselves or to maintain employment were not to be held against the veterans.

Necessity for curtailing this brief, which is printed at the expense of counsel, forbids a more extended review of the authorities. Nor is there anything to be gained by such effort.

From the vast number of decisions we allude to the following more recent authorities, as decisive of the question that notwithstanding the evidence as to extended periods of labor, the finding of the jury is conclusive where there is any substantial evidence of disability.

We have restricted our citations, with one exception, to decisions rendered in 1932 and 1933.

In *United States v. Godfrey,* 47 Fed. (2d) 126, the Government relied upon admitted proof that from his discharge, in 1919, the veteran worked for a laundry company, with the exception of a few months, continuously until 1927—a period of eight years—earning from $30.00 to $35.00 a week.

The Court said:

> "To hold him remediless because he tried manfully to earn a living for his family and himself instead of yielding to justifiable invalidism, would not, in our view, accord with the treatment Congress intended to bestow on our war victims."

The foregoing language, "yielding to justifiable invalidism" recalls that the final discharge of Burley-

son, the appellee, contains a notation "invalided from the naval service," as well as "duration permanent."

That the finding of the jury is conclusive, no matter how sharp the conflict on the question of disability, in the face of a work record, is settled by the following authorities:

United States v. Martin, 54 Fed. (2d) 554 (Fifth Circuit);

United States v. Irwin, 61 Fed. (2d) 489 (Fifth Circuit);

United States v. Harth, 61 Fed. (2d) 541 (Eighth Circuit);

Bartee v. United States, 60 Fed. (2d) 247 (Sixth Circuit); reversing a directed verdict for the Government;

Quinn v. United States, 58 Fed. (2d) 19 (Third Circuit);

Storey v. United States, 60 Fed. (2d) 484 (Tenth Circuit);

Garrison v. United States, 62 Fed. (2d) 41 (Tenth Circuit); reversing a directed verdict for the Government;

United States v. Baxter, 62 Fed. (2d) 182 (Ninth Circuit); involving work record;

United States v. Roberts, 62 Fed. (2d) 594 (Tenth Circuit).

In the last case cited, the Court say:

> "In addition to this there is evidence that he tried repeatedly to work steadily and failed. This is strong evidence that he was not able to follow continuously a substantial gainful occupation."

This Court cannot fail to note that Burleyson was discharged as permanently disabled.

In *Storey v. United States,* supra, the veteran was discharged by a medical board, which held that he was only *two-sixteenths* disabled at the time of his discharge.

Commenting on this, the Court say:

> "Yet he was discharged because he was physically unable to be of any service in the armed forces of the Nation. * * * But there was no niche for plaintiff in his condition; he was discharged because there was no task connected with the Army which he was physically able to perform. * * * We do not understand how it is possible to rate one in such a condition as two-sixteenths disabled. Under these circumstances the rule is applicable that, 'when the testimony of a witness is positively contradicted by the physical facts, neither the Court nor the jury can be permitted to credit it.' "

The Court then reversed the judgment and nonsuit.

It would be profitless to review the facts of all these decisions. The opinions of the Ninth Circuit should be conclusive.

To conclude:

An eighteen year old farmer youth enlisted in the Marines as a healthy, normal citizen, with patriotic motives. He was stricken with all the afflictions that attack so many of our newly enlisted men. In swift succession, influenza, appendicitis, tonsilitis, crushed arches and Buerger's disease, attacked him. The military service had no further use for him. As a wreck, he was honorably discharged and thrown back branded as permanently disabled. He was compelled to sign a waiver.

For seven years after his discharge he remained in ignorance of his right to hospitalization treatment or compensation. He believed his rights dead. To support himself he worked intermittently, leaving job after job, when his disability no longer permitted him to continue.

The evidence conclusively shows that he was permanently afflicted with an incurable disease when he left the service; that there is no hope of a cure and only by constant rest and inactivity can he possibly escape amputation.

For four years he has been helpless and has earned nothing. He has been just as much disabled as if his legs were amputated, for they are useless extremities, clogged with coagulated blood. Every effort he made at labor was to support himself and pay physicians which he would not have required had he known his rights.

As the Presiding Judge pointed out in his questions, every effort at labor was at the expense of his health and in the face of constant agony.

To say that a verdict, based upon evidence thus clear and substantial, is to be reversed because a veteran has struggled, at the peril of his life, to support himself, is to destroy the spirit of the War Service Act.

Dated, San Francisco,
March 24, 1933.

Respectfully submitted,
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